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A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

VOL. V.

A

DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

THE SECOND EDITION, REVISED AND ENLARGED.

VOLUME THE FIFTH,

CONTAINING

Title 33. Private Act.
34. King's Grant.
35. Fine.
Title 36. Recovery.
37. Alienation by Custom.

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OF

The Laws of England

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REAL PROPERTY.

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A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

TITLE XXXIII.

PRIVATE ACT.

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2. *Private Act.*
6. *What makes an Act private.*
12. *Some Cases in which Private Acts may be obtained.*
21. *Mode of passing Private Acts.*
29. *Operation of a Private Act.*
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39. *Construction of Private Acts.*
45. *Effect of the General Saving.*
49. *May be relieved against.*

SECTION 1.

HAVING explained the nature and operation of deeds entered into by private persons, which derive their effect from the consent of the contracting parties, I shall now proceed to treat of those assurances which are effected by matter of record; that is, where the sanction of a court of record is called in to substantiate, preserve, and be a perpetual

Alienation by Matter of Record.

testimony of the transfer of property, from one person to another.

Assurances by matter of record are, 1. Private acts of parliament; 2. King's grants; 3. Fines; and, 4. Common recoveries.

Private Act.

2. Private acts of parliament derive their origin from the following circumstances. It was a common practice, so early as in the reign of Edw. I., for persons to present petitions to parliament for relief in private affairs. These were referred to certain prelates, earls, and barons, appointed at the meeting of every parliament to be receivers and tryers of petitions; who, upon examination of the contents of such petitions, indorsed upon them what course was to be pursued by the petitioners to obtain redress.

Hale's Juris. of Lords, c. 4 & 10.

Id. c. 12.

3. In those cases where the petitioners might have relief by the ordinary course of law, in the King's courts, the answer was, that the petitioners might sue at common law; and sometimes the petition was referred to the proper court in which the case was determinable: but where the petitioner could have no relief without a new law, made by an act of parliament, either in that particular case, or which might, by a general purview, extend to it, the petition was referred to parliament, and an award was made upon it by the King and the Lords, or by the Lords alone, and sanctioned by the King, which had all the force and effect of a statute.

Rot. Parl. vol. 3. 427. N° 78, 79.

4. In the first year of the reign of Hen. IV. the Commons indirectly claimed a right of concurring with the Lords in the consideration of petitions, and of joining in the awards made upon them; but the Archbishop of Canterbury told them, in the King's name, that they were only petitioners, and that all judgements appertained to the King and to the Lords,

unless it were in statutes, grants, subsidies, or such like; the which order the King would from that time be observed.

5. It became, however, fully established in the reign of Rich. III. that no award could be made on a private petition, without a formal and complete act of the whole legislature; and therefore, from that period, such awards have been called private acts of parliament; and have been distinguished in the statute book from public ones.

What makes an Act private. Dig. Tit. Parliam. R. 7.

6. A private act is described by Lord Ch. B. Comyns, to be a statute which concerns only a particular species, or thing, or person. And in 39 Eliz. it was resolved by the Court of King's Bench, that the statute 21 Hen. VIII. c. 13., by which spiritual persons were abridged from having pluralities of livings, was a general act; because it concerned the whole spiritualty in general. But it was admitted that the statute 18 Eliz. c. 6. concerning colleges in the two universities, and the colleges of Eton and Winchester, was a private act. It was also observed, that the statutes 13 Eliz. c. 10. and 18 Eliz. c. 11., concerning colleges, deans and chapters, hospitals, parson, vicar, or any other, having any spiritual or ecclesiastical living, were general acts; and that the statute 1 Eliz. concerning leases made by bishops, was a private act, because it concerned the bishops only, who are but a species of the spiritualty.

Holland's Case, 4 Rep. 76.

5 Rep. 2 *a*.

4 Rep. 76 *a*.

7. It is said in the same case, that if an act is special which extends *ad species, a multo fortiori* it is special or particular which extends *ad individua*. Now, although the matter be special, so that under it there are no *individua*, yet if it is general as to persons, it is a general act; but if it concerns *aliquod singulare seu individuum*, although it be general as to

persons, it will be deemed a private act. So, although the act, as to persons, be general, but the matter thereof concerns *individua*, or singular things, as a particular manor, house, &c., or all the manors, houses, &c. in one or sundry particular towns, or in one or divers particular counties, it is a private act.

4 Rep. 77 *a*. 8. It is also laid down by the Court in Holland's case, that every act, although the matter thereof concerns *individua*, or single things, yet if it touches the King, it is a public act; for every subject has an interest in the King, as the head of the commonwealth. And it was resolved, in the case of Willion v. Berkeley, that an act which was made in 35 Hen. VIII., by which all conveyances made by the Lady Catherine, (Henry VIIIth's queen,) or to her, by or to the King, should be valid, was a public act.

Plowd. 228. 231.

9. In a public act there may be a private clause, as in the statute 3 Ja. I., the clause which gives the benefices of recusants in particular counties to the universities, is a private act. The statute 23 Hen. VI. c. 9. respecting bail bonds, was for a long time considered as a private act, but in a modern case it was held to be a public one.

Samuel v. Evans, 2 Term R. 569.

10. A private act is not printed or published among the laws of the sessions. It remains, however, enrolled among the public records; and, in general, must be specially set forth and pleaded; otherwise no judge or jury are bound to take notice of it. But it has lately been a practice to insert a clause in acts of a private nature, declaring that they shall be deemed public acts.

1 Inst. 98 *b*. *n*.

11. In modern times, a private act of parliament respecting real property, which is usually called an estate act, is a conveyance or settlement of lands or hereditaments, made under the immediate sanction

of parliament, in cases where the parties are not capable of substantiating their agreements without the aid of the legislature, and where the carrying such agreements into effect is evidently beneficial to the parties.

Some Cases in which Private Acts may be obtained.

12. It would be utterly impossible to enumerate the variety of cases in which private acts of parliament may be obtained. A few of them shall, however, be mentioned.

13. Where a person is tenant for life, with remainder to his first and other sons in tail, under a will or settlement, and he has either no children, or has children who are under age, if an opportunity offers of selling the estate to great advantage, a private act may be obtained for vesting such settled estate in trustees in fee, discharged from the uses of such will or settlement, upon trust to sell the same, and to lay out the money in the purchase of other lands, to be settled to the same uses.

14. Where a person, having an estate in strict settlement, has an opportunity of making an advantageous exchange with another person, or is desirous of exchanging his settled estate for another estate, whereof he is seised in fee, a private act may be obtained for vesting the settled estate in the person with whom such exchange is agreed to be made, or in the tenant for life himself, in fee simple, and limiting the estate taken in exchange to the same uses to which the settled estate stood limited.

15. Where an estate limited in strict settlement is charged with the payment of a sum of money, a private act may be obtained for vesting the whole, or a competent part thereof, in trustees, in fee simple, upon trust to sell the same, and out of the money to pay off the debts, and to lay out the surplus

in the purchase of other lands, to be settled to the old uses.

16. Where a tenant for life has no power of making leases, and it would be advantageous to the estate if it could be let for a long term of years, a private act may be obtained for enabling the tenant for life to make long leases, under such reservations and restrictions as are necessary to render such leases beneficial to the estate, and to the persons in remainder and reversion.

17. Where a tenant for life has expended his own money in making improvements beneficial to the inheritance, or is desirous of making such improvements; a private act may be obtained, enabling him to charge the estate with the money so laid out, or to be laid out on such improvements.

18. Where an estate is vested in several persons as coparceners or tenants in common, some of whom are infants, lunatics, or tenants for life; and a fair and just partition is made thereof: a private act may be obtained for confirming such partition, by which the infants, lunatics, or remainder-men will be bound; and each person to whom a share is allotted in severalty, will acquire the legal estate therein.

19. Where a male infant is desirous of marrying, with the approbation of his parents or guardians, a private act may be obtained enabling him to make a proper settlement on such marriage; to be as valid as if he was of age. And there is an act in 14 Edw. IV. by which it was ordained that Henry Duke of Buckingham should be taken, reputed, and adjudged as a person of full age, and that all things by him or against him to be done, should be of such force and effect, as if they were done at his full age.

Rot. Parl. v. 6. p. 128. N°. 24.

20. Where something has been omitted in a deed, which is absolutely necessary to carry it into execution; or where there has been a palpable and evident mistake; a private act may be obtained to supply such omission, or to rectify such mistake.

Mode of passing Private Acts.

21. Where a private act originates in the House of Peers, the mode of proceeding is thus,—a petition is presented to the House signed by all the parties interested in the act, stating the facts, and that the petitioners can only be relieved, or obtain what they require, by the power and authority of the legislature; and praying leave to bring in a bill for the purposes therein mentioned. This must be presented by a peer, and an order of the House is made, referring the petition to two of the Judges, who are authorized and directed to summon all persons concerned in the bill before them, and after hearing them, and perusing the bill, to report to the House the state of the case, and their opinions thereon, under their hands, and to sign the bill.

22. The petition is then carried to the two Judges whom it has been referred, together with a draft of the bill; all the recitals of which are proved before them, in the same manner, and by the same evidence, as in a trial in ejectment. The Judges make their report; and if they approve of the bill, they sign it, and certify that it is proper for effectuating the purposes intended.

23. The bill is then brought into the House, read twice, and committed. The same proofs must be submitted to the committee of Lords, which were produced before the Judges; and the chairman reports it to the House. It is then read a third time, and sent to the House of Commons, where it goes through

the same forms, and is sent back to the House of Lords to receive the royal assent, which is given by the words, *soit fait come il est desiré.*

24. Where a private act of parliament originates in the House of Commons, a petition is presented signed by the parties who are suitors for such act, stating the facts, and praying leave to bring in a bill; which petition is presented to the House by a member. A motion is then made that it be referred to a committee, to examine the allegations in the petition. The evidence must be produced before this committee, and when concluded, the chairman makes his report, and moves for leave to bring in a bill, pursuant to the petition. The bill is then brought in, read twice, and committed; all the evidence is again produced before the new committee, which the chairman reports to the House, and moves that the bill be engrossed. It is then read a third time, and sent to the House of Peers. There it is twice read, and then committed. The evidence is again produced before the committee of the House of Peers; the Lord in the chair reports the bill to the House, it is read a third time, and then receives the royal assent.

25. The consent of all parties in being, and capable of consenting, who have the remotest interest in the property affected by a private act, is expressly required. Unless, says Sir W. Blackstone, such consent appears to be perversely, and without any reason, withheld.

2 Comm. 345.

26. Where infants, or other persons incapable of acting for themselves, are to be bound by a private act of parliament, a full equivalent must be settled on them, in lieu of what is taken by the act; and in general the legislature will not suffer the property of

infants, or other persons incapable of acting for themselves, to be altered by a private act; unless it clearly appear that they will be benefited by such alteration.

27. A general saving is now always added at the close of every private act, of the rights and interests of all persons whomsover; except those whose consent is given or purchased, and all persons claiming under them, and who are therein particularly named.

28. By a number of standing orders made at different times by the Houses of Lords and Commons, every sort of precaution appears to have been adopted by the legislature, to prevent the possibility of surprise or fraud in obtaining private acts, and particularly as to estate bills, which must be referred to two Judges to report on the facts, and the propriety of the bill; but still there have been some cases in which great imposition has been practised on parliament by false evidence.

Vide 34 Geo. III. c. 66.

29. With respect to the operation of a private act, it is as powerful and effective, if duly and properly obtained, as a public one, in transferring the legal estate in lands from one person to another, and in binding all those who are intended to be bound by it, and whose rights are not saved. But it has always been held that a private act does not bind strangers, even before the general practice of inserting a saving clause in every private act was adopted.

Operation of a Private Act.

30. Thus in 21 Hen. VII. it was adjudged, in the case of the prior of Castleacre and the dean of St. Stephen's, that the act 1 Hen. V. c. 7., which gave the lands of priors aliens to the King, did not extinguish an annuity of the prior of Castleacre, which he had out of a rectory, parcel of a priory alien; though there was not any saving in the act.

8 Rep. 138 a.

Barrington's Case, 8 Rep. 136. Godb. 167.

31. So in a case in 8 Jac., where the question was, whether the act 22 Edw.IV. c.7., which under certain circumstances authorizes the proprietors of grounds in forests, after a felling, to inclose them, without the King's licence, for seven years, to preserve the springing wood, should be construed so as to exclude persons having right of common.

Upon this point Lord Coke reports, that the Judges of the Court of Common Pleas were of opinion the commoners were not bound by the statute, for the following reasons:—"It appears by the preamble between what persons, and for and against what persons this act was made; and the parties to this great contract by act of parliament, are the subjects having woods, &c. within forests, chaces, and purlieus of the one part; and the King, and the other owners of the forests, chaces, and purlieus, of the other part. So that the commoners are not any of the parties between whom this act was made." And cited the case of the prior of Castleacre.

Lucy v. Livingston, 1 Vent. 176.

32. In a subsequent case Lord Hale said,—"Every man is so far party to a private act of parliament, as not to gainsay it; but not so as to give up his interest. 'Tis the great question in Barrington's case, 8 Co. The matter of the act there directs it to be between the foresters and the proprietors of the soil; and therefore it shall not extend to the commoners, to take away their common. Suppose an act says, whereas there is a controversy concerning land between A. and B., 'tis enacted that A. shall enjoy it: this does not bind others, though there be no saving; because it was only intended to end the difference between them two."

Bars an Estate Tail and all Remainders over.

33. It was formerly the usual practice, where a tenant in tail applied for a private act of parliament

to bar his estate tail, and convert it into a fee simple, that the persons in remainder and reversion should give their consent to the act. But although such consent be not given, yet an estate tail, and all the remainders over, and the reversion depending on it, may be barred by a private act. This point is fully established in an opinion given by the late Mr. Booth on the following case.

34. The Duke of Kingston being tenant for life under the will of Evelyn Duke of Kingston, with remainder to his first and other sons successively in tail male, remainder to Granville Earl Gower in tail male, with several remainders over: the Duke having no son, agreed with Lord Gower for the purchase of his interest in the estates thus devised, in consideration of 21,000*l.*; and in order to carry this agreement into execution, the Duke and Lord Gower, without the consent of any of the persons in remainder, applied for an act of parliament, stating the preceding facts, and stating that although Lord Gower was enabled by law, with the concurrence of the Duke, to bar the remainder in tail vested in him, and all the remainders, and the reversion expectant thereon, yet as the premises agreed to be purchased by the Duke were limited, after his death, to his first and other sons in tail male, they could not be vested in him in fee simple, without the aid of an act of parliament.

Cases and Opinions, 8vo vol. 2. 400.

A private act was accordingly obtained, by which it was enacted, that the estates in question should be vested in two persons, and their heirs, freed from the uses declared in the late Duke's will, and should be to the use of the then Duke and his heirs; and other estates of equal or greater value were vested in two persons, to the use of the Duke of Kingston for life, remainder to trustees to preserve contingent remain-

ders, remainder to his first and other sons successively in tail male, remainder to the Duke in fee, with a general saving of the rights of all persons, except the Duke and his heirs, and the first and other sons of his body, and their heirs male, and Lord Gower and the heirs male of his body, and all persons claiming any estate in the premises under the will of Evelyn Duke of Kingston.

The Duke of Kingston being desirous of selling one of the estates vested in him in fee under this act, a doubt was suggested touching the effect of the act, with respect to the persons claiming under the late Duke's will, in remainder, expectant on the determination of the estate tail vested in Lord Gower; how far their rights and interests were barred by the act; as well in the estate whereof the uses were discharged by the act, as in the estates settled by way of equivalent; the same being limited to the Duke in fee simple, upon failure of issue male of his own body, and not to the uses limited in the will.

In answer to this objection, Mr. Booth gave an opinion, that even supposing the rules and orders of the House of Peers, with respect to summoning all persons concerned in interest to appear and consent, were not observed, this would not invalidate the act, for either House of Parliament might dispense with their own orders, whenever they thought fit; but here was no grievance, no irregularity. The rights of the persons in remainder, after Lord Gower's estate tail, were of no value, since by a common recovery duly suffered, those rights could be annihilated in the next term; as the parties were obliged to go to parliament, they were advised, and rightly advised, that to suffer four recoveries (for the lands lay in four counties) would be to go to a needless expence: for

that in a case where parliamentary assistance was, on other accounts, indispensably necessary, there the parliament would so frame their words, which were to become a law, as to have the same force and operation, and to bar all rights that would be barred by a common recovery. *Frustra fit per plura quod fieri potest per pauciora*, was a rule of equity, reason, and good sense.

35. The docrine here laid down by Mr. Booth has been fully confirmed by a modern case, in which the Court of Chancery held that a private act would bar an estate tail, and all remainders expectant thereon, and also the reversion, although the rights of the remainder-men were not excepted in the saving.

36. Robert Westby being tenant for life, under a settlement of an estate in Lancashire, with remainder in fee to four persons, as heirs at law to the settlor; and being tenant in tail of another estate in Yorkshire, with remainders over, under which the defendant *John* Westby claimed; and having occasion for money to pay debts, and one of the heirs at law being an infant, a private act was obtained in 1731, on the application of Robert Westby, and the heirs at law, by which a part of the Lancashire estate was vested in trustees, to be sold for payment of Robert Westby's debts: and the Yorkshire estate was vested in trustees, to the use of Robert Westby for life, with limitations over, as in the settlement; with a power for Robert Westby, in case of failure of issue male of his body, to charge the Lancashire estate with a sum of money. The saving clause at the end of the act saved the rights of all persons, except those of Robert Westby, of the reversioners of the Lancashire estate, and of the heirs and issues of Thomas Westby: but no ex-

Westby v. Kiernan, Amb. 697.

4 Geo. 2. c. 29.

ception of the heirs or issue of —— Westby, under whom the defendant John Westby claimed.

Robert Westby, by deed in 1732, executed his power, and died without issue, having devised the money charged by the execution of the power to his executors, upon several trusts.

Upon a bill filed by the executors to have the sums raised which were charged by Robert Westby, a question arose, whether the power given by the act of parliament, to charge the Yorkshire estate, could take place against the defendant John Westby, who claimed under —— Westby, the person entitled in remainder upon the death of Robert Westby without issue. Lord Apsley was clearly of opinion, that Robert Westby being tenant in tail of the Yorkshire estate, the right of those in remainder was, and was meant to be barred by the act; and that there was no occasion to except their rights, as was done in other cases where the act passes upon the application of a tenant for life; for Robert Westby being tenant in tail, might have barred the remainder by a recovery: and therefore this case differed from that of the Duke of Somerset, who procured an act of parliament for the exchange of livings: he was only tenant for life; and the right of those in remainder not being excepted out of the saving clause, they were not bound by the act.

infra, § 38.

But not a Remainder after an Estate for Life.

37. But where a tenant for life enters into an agreement to convey the fee simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life estate.

Provost of Eton v. Bp. Winton, 3 Wils. R. 483.

38. Thus, in the case alluded to by Lord Apsley in Westby v. Kiernan, it appeared that Charles Duke

of Somerset having the honour of Petworth, was desirous of acquiring the rectory appendant to it, which belonged to Eton College; and not having any benefice or advowson whereby he could tempt the College to give him the rectory of Petworth in exchange, he applied to and prevailed on the Crown to give to the college the advowson of Worplesdon, and the Duke in return agreed to give to the Crown the rectory of Overblowes as an equivalent. Whereupon it was agreed that the advowson of Worplesdon should be vested in Eton College, the rectory of Petworth in the Duke, and the rectory of Overblowes in the Crown, for ever.

This agreement was confirmed by a private act of parliament in 4 & 5 Will. and Mary, whereby it was enacted, that the advowson of Overblowes should be, and thereby was vested and settled in their Majesties and their successors, in right of their Crown, for ever: that the advowson of Worplesdon should be settled and vested in the provost and college of Eton, and their successors, for ever; and that the advowson of Petworth should be, and was thereby vested in the Duke and Duchess of Somerset and their heirs, with a saving of the rights of all persons (other than their Majesties, &c. the Duke and Duchess of Somerset and their heirs, and Eton College and their successors,) to the said advowsons, or any of them.

It was afterwards discovered, that by a settlement made previous to this act, the rectory of Overblowes was limited to the use of the Duchess of Somerset for life, remainder to her son Algernon Earl of Hertford in tail male, remainder to the issue female of the Duchess; and that Lord Hertford having died without issue male, the rectory vested in his sister Lady Catherine, who married Sir W. Wyndham, and died

leaving Charles, afterwards Earl of Egremont, her eldest son, who died, leaving George Earl of Egremont his eldest son.

It was admitted on both sides, that upon the death of the Duke of Somerset, the rectory of Overblowes vested in Lord Egremont; because he was within the general saving of the act.

Construction of Private Acts.

39. Private acts are construed in the same manner as conveyances that derive their effect from the common law; and therefore, when any doubt arises upon the construction of a private act, the Court will consider, what the object and intention of the parties was, in obtaining the act; and will, if possible, give effect to that intention.

ante, § 38.

40. In the case of the Provost of Eton v. the Bishop of Winton, which has been already stated, the Crown having lost the advowson of Overblowes, to which Lord Egremont became entitled, claimed from the College of Eton the advowson of Worplesdon, and presented to it; upon the principle that the whole transaction became void by the defect of title in the Duke of Somerset to the advowson of Overblowes; whereupon the College of Eton brought a *quare impedit*. It was contended, on the part of the Crown, that private acts were to be construed like deeds; and that this act should be considered as an exchange, in which there was a mutual warranty; and that the eviction of the advowson of Overblowes, by Lord Egremont, gave the Crown a right to be restored to the advowson of Worplesdon. But it was answered, on the part of the College of Eton, that the act could not be considered as an exchange, because an exchange could only be made between two parties: besides, the act could not be construed to operate as a deed of exchange, the word exchange not being

Tit. 32. c. 6. § 13.

once mentioned therein: the act made use of no words of conveyance, but vested the several advowsons in the respective parties, under the agreement.

Judgement for the College.

41. A private act was passed in the year 1777 for inclosing and dividing the common and waste lands within the manor of Yealands, by which it was enacted, that the commissioners should set out, allot, and assign unto the lady of the manor, twenty statute acres of the common and waste grounds, in lieu of, and as compensation for, her right and interest in and to the soil of the residue of the common; and then that the commissioners should allot and assign the residue of the common unto, for, and amongst the said lady of the manor, for and on account of her messuages, tenements, lands, and hereditaments within the said manor, in respect whereof she was entitled to right of common, and to the several other persons having right of common, and to their heirs and assigns for ever, according and in proportion to their several and respective rights, &c.

Townley v. Gibson, 2 Term R. 701.

A subsequent clause directed that "all and every the allotments, &c. to be made under the act, should be vested in fee simple in the several and respective persons, &c. to whom the same should be set out or allotted, and their heirs, assigns, and successors respectively for ever, absolutely freed and discharged of and from all customary tenures, rents, fines, boons, and services whatsoever; and that the several shares or allotments so to be set out as aforesaid, should be in lieu of and in full compensation and satisfaction for all rights of common, and other former property, privilege, right, &c.; and that all rights of common, together with all former rights, interests, profits, &c. in and upon the same, should, from and immediately

after that time, cease and be for ever barred and extinguished. Provided always, and it was further enacted, that nothing in that act contained should extend to prejudice, lessen, or defeat the right, title, or interest of the said lady of the said manor, her heirs or assigns, of, in, or to the seigniories incident or belonging to the said manor; but that she and they and every of them should and might at all times thereafter hold and enjoy all rents, fines, services, courts, perquisites and profits of courts, goods and chattels of felons and fugitives, felons of themselves and put in *exigent*, deodands, waifs, estrays, forfeitures, *and all other royalties* and manorial jurisdictions whatsoever, in and upon the said common and waste grounds thereby intended to be inclosed as aforesaid, to the said manor, or the lord or the lady thereof for the time being, incident, belonging, or appertaining; and the same in as full, ample, and beneficial a manner to all intents and purposes, as she or they might or could have held or enjoyed the same, in case the act had not been made."

Before the passing of this act, the lady of the manor was entitled to the mines and minerals lying under the soil of the manor, of which they had made several leases, the last to one Tissington in 1757, for 21 years, under which the mines were worked, and continued to be so till the year 1759; but from that period the lessee discontinued the works, though the lease was subsisting at the time when the act was made.

The question was, whether the lady of the manor was entitled to the mines, under the clause of reservation in the act, allotting the inclosures to the several tenants of the manor.

It was contended on behalf of the tenants of the manor, that the act barred the lady of the manor

from claiming any future right to the mines and minerals: for by the first clause it appeared that the commissioners were to set out twenty acres to the lady of the manor, in lieu of and as a compensation for her right and interest in the soil of the residue of the waste; and, on the other hand, that all allotments to the several tenants were to be in fee; which the act declared should be a full compensation for all rights of common, and other former property, privilege, right, title, interest, claim, and demand whatsoever. That if the act had stopped there, there could have been no doubt but that the lady of the manor would have had no right whatever to the mines in the allotments: but if the clause of reservation entitled her to them, and a right still remained in her of digging in those inclosures, without making any allowance for the injury sustained by the owner of the soil, all the purposes of the act would be defeated. The latter clause only provided that the lady of the manor should suffer no prejudice as to her right to *all seigniories* incident to the manor; and that she should still enjoy all rents, fines, services, &c. and other royalties and manorial jurisdictions: but there was nothing in that clause which had the least reference to the soil of the manor; and the particular enumeration of the things intended was decisive that mines were not intended to be reserved, otherwise they would have been mentioned. The word seigniories in the former part of the clause was defined and explained by the words which followed, and could only mean things of the same nature as those mentioned.

On the other side it was said, that this being a private act, passed at the requisition of the parties concerned, was to be construed like all other private

agreements; consequently the Court would consider the probable intention of the parties, to be collected from the situation and state of their several rights, at the time when the act passed. The ancestor of the defendant was the lady of the manor, and as such she would have been entitled, not only to the mines under the wastes, but also under the copyhold inclosures, unless there had been some custom to exclude her: the right of these mines existed in the lady of the manor, separate from the interest in the soil, as appeared from the leases of the mines, during the continuance of the last of which, the act passed. It was admitted that the words in the first clause were large enough to comprehend mines, if such had been the intention of the parties; but that could not have been so intended, for then the subsisting lease would have been affected, and the rents thereby reserved; which certainly could not have been intended, inasmuch as they were reserved expressly by the word rents in the saving clause, there being no other rents to which that word could relate; and there being a reservation of the rents to the lord, the right to the mines themselves, out of which the rent issued, would also be reserved to him. Besides, there were other words in the saving clause which were sufficiently comprehensive to reserve the right of digging for mines; such as seigniories and royalties: if therefore the mines had been intended to have been taken out of the lord, there should have been express words for that purpose.

Lord Kenyon.—"I agree that private acts of parliament are to be construed according to the intention of the parties; but then that intention must be collected from the words used by the legislature, without doing violence to their natural meaning. The

defendant's counsel has supposed that mines are a distinct right from the right to the soil; but I do not think so, where they are under the soil of the lord of the manor. In cases of copyholds, a lord may have a right under the soil of the copyholder; but where the soil is in the lord, all is resolvable into the ownership of the soil, and a grant of the soil will pass every thing under it. The only word in the saving clause which affords any ground for argument, is the word *rents;* but when we see how that word is used with the others in that part of the act, it cannot be taken to include mines. At the time of passing this act of parliament, the mines under the waste ground were in the lady of the manor, as part of the demesnes. She intended to give up several rights to the tenants, for which she has reserved a satisfaction. Then how do the tenants hold their allotments under the act? They could not take as copyholders, unless the act of parliament had so directed; but they take their allotments as freehold estates of inheritance. It is extremely clear, that no new tenure can be created, unless by the authority of parliament, since the statute of *quia emptores;* nor can any person reserve to himself a right of escheat. Then it was urged by the defendant's counsel, that the act of parliament could not affect the lease which was in existence when it passed. It certainly could not; neither would it have been affected, if the lady had sold her estate in the manor, but the alienee would have become the landlord, and entitled to the beneficial interest reserved by the lease. So here the lease will remain valid, but the right to the rent of the mines will pass to the person in whose favour the allotment was made under the act. For we cannot narrow the words of this act; and that transfers all the right in the soil

to the several tenants. There is no doubt but that the mines might have been reserved. If it had been so intended, it would have been by express words; but there is no such reservation here. The word *rents* is explained by the other words used; but those rights which are reserved, are mere badges of royalty, incorporeal rights, and other fruits of tenure of the same sort." The other Judges concurred.

42. A recital in a private act, as to the construction of a deed recited in such act, is not binding on the parties.

Tit. 32. c. 20. § 69. Thus it has been stated, that in the Duke of Richmond's case, a private act was obtained for vesting the lands purchased with the 60,000*l.* in the eldest son, upon his securing the portions to the younger children. In this act it was recited, that the younger sons and daughters of the late Duke of Richmond were, by virtue of the said marriage articles, severally seised of and entitled to the lands then purchased with the said 60,000*l.*, as tenants in common to them and the heirs of their respective bodies, with cross remainders of such of their respective shares, in case of any of their deaths without issue, to the survivors of them in common in tail.

Collect. Jur. vol. 2. 374. Lord Apsley, in his judgement on this case, said, it was mentioned in the recital of the act, that the younger children were entitled as tenants in common to estates tail, with cross remainders, in case of the death of one or more of them. But though this recital was inserted in the act, yet there was no notice taken of it in the enacting part, which was quite silent as to that question.

It had been argued on the part of the plaintiff, that the duke was bound by this recital. If it had been enacted, that cross remainders were limited between

the younger children, though founded upon a misrecital, yet it would have been conclusive against the duke, and cross remainders established. Though, generally, recitals in private acts, or in deeds, are not binding to the parties; nor, as this recital was, had it at all affected the case. Therefore the question was fairly open for the duke to contend that there were no cross remainders established.

But this recital, though not conclusive, would have some weight; for it showed that the persons who prepared and passed the act, looked upon the articles in that light; which the Court would pay a regard to, though it might not be of opinion that such recitals should constantly bind.

Effect of the General Saving.

43. With respect to the general saving clause which is inserted in every private act, difficulties have arisen on the construction of it, where it is contradictory to the body of the act.

1 Rep. 47 *a*.

In the case of Alton Woods, it is laid down, that a saving in an act of parliament, which is repugnant to the body of the act, is void: as in Plowden, 365, where the supposed attainder of the Duke of Norfolk was by act of parliament, 1 Mary, declared to be void *ab initio*, saving the estates and leases made by King Edw. VI. The saving was held to be void; for where the attainder was declared to be void, the saving was against the body of the act, and therefore void.

44. This doctrine appears to have been supported in modern times; it being held, that the general saving clause in a private act will not control the provisions contained in the body of the act, but must be so expounded, as to be rendered consistent with the body of the act, or else be void.

Wood v. Cecil, 2 Vern. 711.

45. A private act was obtained for the sale of Lord Stawell's estate, by which it was enacted, that the estate should be vested in trustees, to be sold; and that the money arising from the sale should be, in the first place, applied to pay the mortgagees, and afterwards the creditors by statutes, judgements, and recognizances. At the close of the act, there was a general saving of the rights of all persons, except the heir at law, and others of Lord Stawell's family.

Several of the statutes and judgements were prior to some of the mortgages, and there being a decree for sale and execution of the trust created by the act, a question arose in the Court of Chancery, upon a special report, whether the mortgagees should be paid in the first place, or whether the creditors by statutes, judgements, and recognizances, should be let in according to their priority, or be postponed to the mortgagees.

For the creditors by statutes, judgements, and recognizances, it was insisted, that their securities bound the land as well as the mortgages. They were, both in law and equity, to be considered as having a prior right to the subsequent mortgagees. And although, in the beginning of the act, it was provided, that the mortgagees should be paid in the first place, yet there was a general saving of the rights of all persons, except the heir at law, and those of Lord Stawell's family; and that saving set the matter at large again, and restored them to their priority.

Tit. 15. c. 5. § 5.

Lord Cowper said, the act expressly provided, that the mortgages should be paid in the first place; and the general saving must not control the express provision of the act, but must be so expounded, as

to consist with the express preference given to the mortgagees; and he must decree the execution of the trust accordingly; but seemed to admit, that by virtue of the general saving in the act, they might make use of their incumbrances as they could at law.

46. In the case of Westby v. Kiernan, which has been already stated, the right of the remainder-man, expectant on the determination of the estate tail, was saved, not being excepted in the general saving; and yet he was held to be barred, for otherwise the act would have been nugatory. ante, § 36.

47. Where the enacting part of an act of parliament for inclosing the wastes and commons of a manor, expressly exonerates certain lands from the payment of tithes, the rector will be barred from claiming tithes out of those lands, though he be comprehended in the saving clause of the act.

48. By an act of parliament made in 13 Geo. III. for inclosing and dividing certain moors, commons, or tracts of waste land within the parish and manor of Lanchester, it was enacted, that the commissioners should, after setting out 30 acres to the curate of Latley, and other portions of land for the purposes therein mentioned, set out the residue of the said land unto, and amongst the Bishop of Durham, who was the lord of the said manor, and the several other persons having rights of common thereon, according to the value of their respective estates: And that all such lands as should be allotted to any persons in respect of their respective lands and tenements, should be held by them in the same manner as their respective messuages, &c. in right of which such allotments were holden respectively; and subject to the same species of tithes only, in the Riddle v. White, 4Gwill. 1378.

same manner, and to the same persons, as they were accustomed to pay.

It was further declared, that the said commissioners might sell so much of the said moors or commons as they should think fit, to raise money to pay the expences attending the obtaining and executing the act, and the expence of dividing the said moors and commons, making public highways, &c. &c.

It was further declared, that the persons who should become purchasers of the said lands so to be sold, should hold the same *discharged from the payment of all manner of tithes*, and other estates, rights, and duties whatsoever, to any person or persons, politic or corporate.

And in the said act were two clauses in the words following:—" Saving always to the King's most excellent Majesty, his heirs and successors, and to all and every other person and persons, bodies politic or corporate, his, her, and their successors, executors, and administrators, (other than the lord of the manor of Lanchester aforesaid, and all other persons entitled to a right of common in or upon the said moors or commons, his, her, or their heirs, successors, executors, or administrators respectively, and the person or persons, bodies politic or corporate, his, her, and their heirs, successors, executors, and administrators, who shall by virtue of this act make any claim affecting the boundaries of the said moors or commons, or any claim of any right of common thereon, which shall be adjudged and determined against him, her, or them as aforesaid,) all such right, title, and interest as they, every, or any of them had or enjoyed of, in, to, or out of the said

moors or commons hereby directed to be divided and inclosed as aforesaid; or could, or might, or ought to have had or enjoyed, in case this act had not been made."

"And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, by all judges and justices, and other persons whomsoever, without specially pleading the same."

The impropriator of the parish of Lanchester, some years after the passing of this act, filed his bill in the Court of Exchequer against certain occupiers of land in the parish, stating that the commissioners under this bill had caused twelve plots of land to be sold, to raise money for defraying the expences of the bill: that the defendants, who were purchasers thereof, immediately improved their lands, and converted them into arable ground: that the plaintiff, to prevent any doubt which might arise whether the said lands were to be considered as barren land, and as such exempt from the payment of tithes during seven years, had not during that time required any tithes to be paid to him: that the defendants had during the preceding years been the occupiers of the lands which had been so sold, and had grown upon them great quantities of wheat, &c.: and requiring a discovery of the tithe which had arisen during those years; and praying an account of such tithes, and that the defendants might be decreed to pay the amount thereof to the plantiff.

To this bill the defendants demurred; for that it appeared by the bill that the lands which were in the defendants' occupation were freed and discharged

from the payment of all manner of tithes by the said act.

In support of the demurrer it was contended, 1°. That the plaintiff's right as impropriator was not saved by the saving clause in the act: that it was clear it was not saved by the words of that clause, because it saves only rights of, in, to, or out of the moors or commons; and a right to tithes was not a right of, in, to, or out of land, but was a right to something collateral to the land. That tithes were an ecclesiastical inheritance, collateral to the estate of the lands; and of their proper nature due only to ecclesiastical persons, by the ecclesiastical law.

2°. That the impropriator's right not only was not saved by the saving clause, but that it did not appear to be the intention of the legislature to save it; because it was highly reasonable that the impropriator, who derived great benefit from this act, by which the lands out of which the tithes arose were rendered much more profitable than they were before, should bear his proportion of the expence of the act. That by the lands which were sold to raise money for paying the expence of this act being exempted from tithes, the impropriator bore his just proportion of the expence, but nothing more.

3°. That if, however, the words of the saving clause did extend to the impropriator, and it could be supposed that the legislature intended by that clause to save his right, yet the clause was void, because it was repugnant to the body of the act, which expressly declared that the lands to be sold should be discharged from the payment of tithes. That the decisions of courts of justice with respect to private acts of parliament, were exactly the same as with respect to

deeds; and in a grant, every exception which was repugnant to the grant was void. That this, however, was a public act, and every clause in an act of parliament, repugnant to the body of the act, was void.

4°. That it would be very hard on the defendants, if they were compelled to pay tithes for lands which they had purchased, upon the faith of an act of parliament, declaring that they were discharged of tithes.

On the other side it was insisted for the plaintiffs, that this act of parliament was to be considered as a public act, only for the purpose of being judicially taken notice of by the Judges, without being specially pleaded; and for no other purpose whatsoever. That acts of this kind, though declared, for the special purpose mentioned in them, to be public acts, were never kept in the parliament roll, nor printed among the statutes; and did not receive the royal assent in the same words by which public acts receive it; that they were in fact to be considered as parliamentary conveyances, and not as public statutes, which concerned all the King's subjects.

That the saving clause was not void, though it was repugnant to the body of the act; because it was of the very nature of a saving clause that it should be repugnant to the body of the act; the object of it being, to control every thing in the act, as far as it affected the interests of persons not parties to the act. That if saving clauses were not to be so considered, they were useless; because if the rights of the parties were not expressly disposed of by the act, they would be saved to them, even though there were no saving clause: as if here the act had not declared that the lands should be discharged of tithes, the impropriator would have been entitled to tithes, though there had been no saving clause. A saving clause might have an operation, though not expressly

repugnant to the body of the act: as if it had been declared in this case that the land should be freed from all charges, without mentioning tithes; and then there had been a clause, saving the right of the impropriator. That the cases of grants were totally unlike the present; for the reason why an exception contrary to the words of the grant was void, was, because the words of the grant were to be taken most strongly against the grantor.

Lord Ch. Baron.—"Without going into an elaborate argument in this case, it is sufficient to say that it falls within all the principles of a contradiction between a saving and an enacting clause in an act of parliament; and that the case is exactly the same as that of the Duke of Norfolk, as Alton Woods' case, and the case in Vernon. The legislature takes it upon itself to alter entirely the mode of tithing all the lands which are to be the subject of the inclosure; it is impossible to say that the rector is entitled to his tithes of the land in question, without saying that he would have it in his power to defeat all the purposes of the act, which the legislature never could intend. This case is, in point of principle, precisely the same as the case in Vernon. In private acts, in general, the legislature does nothing more than enable persons to enter into a contract, who could not otherwise enter into it; and the persons who are parties to the act, are expressly named in it; but here the legislature does a great deal more, it takes on itself to act on the land itself, to declare that it shall be discharged of tithes; accordingly, therefore, to the principles of the decided cases, and indeed of common sense, we think that the rector cannot claim his tithes, against the express words of the act of parliament; and that the demurrer must be allowed."

ante, § 43.

49. A private act of parliament appears to have been formerly considered as an assurance of so high a nature, that although it was obtained by fraud, yet it could not be relieved against by any of the courts of law or equity, but only by the power that made it; that is, by parliament: and Mr. Booth, in the opinion which has been mentioned, lays it down that inferior jurisdictions are as much bound to submit to a private act of parliament, as the meanest subject; provided the record is right. They may expound or explain, keeping to the intention of the makers, but not question or impeach what the legislature has thought fit to enact as an act of parliament. If there be any grievance or irregularity, that must and can be remedied or rectified only by another act of parliament. May be relievedagainst.

50. Sir William Blackstone has however said, that a private act of parliament has been relieved against, when obtained upon fraudulent suggestions; and has cited two cases in support of this assertion. 2 Comm. 346.

51. The first of these is Richardson v. Hamilton, in which the Court of Chancery set aside an act of the house of assembly of Pennsylvania. It may be seen in the book of decrees for the year 1732, pa. 344, at the report office of the Court of Chancery.

52. The second is a case determined by the House of Lords on an appeal from the Court of Sessions in Scotland, which shall be stated from the Printed Cases.

Sir James M'Kenzie being tenant in tail of an estate in Scotland called Roystoun, with the concurrence of his only son George, and of his nephew Sir George M'Kenzie, the two first remainder-men, obtained a private act to sell the estate for payment of certain debts, which were stated in the act to amount M'Kenzie v. Stuart, Dom. Proc 1754.

to 51,350 merks Scots, or 2,852*l.* 15*s.* 6*d.*; and the act expressly directed that the trustees should, out of the money arising from the sale of the estate, pay off the said sum of 51,350 merks Scots, and lay out the residue of the money in the purchase of other lands, to be entailed as the former ones.

Sir James M'Kenzie sold the estate, and prevailed on his son and nephew to consent that the whole purchase money should be paid to him without account, in consideration of his laying out 1,000*l.* thereof to the uses of the entail; and an agreement dated the 17th August 1739 was entered into for that purpose.

It was afterwards discovered that there were two debts included in the sum stated in the act of parliament, and in the agreement of the 17th August, as charges on the estate tail, which were in fact fictitious and fraudulent: in consequence of which Sir George M'Kenzie, who became entitled to an estate tail in the lands purchased, by the death of Sir James M'Kenzie, and his son George, brought an action in the Court of Sessions against the representatives of Sir James, and the trustees of the act of parliament, for an application of the residue of the purchase money, after payment of the just, true, and lawful debts, really affecting the entail, and for an account of what payments had been made.

It was objected that Sir George was, by the agreement of the 17th August, barred from calling for such an account.

The Lord Ordinary, by an interlocutor, found that "Sir George was not barred by the agreement from objecting to the debts, or from proving the same to be fictitious, and not real debts affecting the estate of

Roystoun, at the time of the sale;" and granted warrants for letters of incident diligence, for recovering the grounds and instructions of the said debts.

The representatives of Sir James M'Kenzie pleaded that the act of parliament, by reciting these debts as subsisting, and as charges upon the entailed estate, established them as such, was final, and excluded all examination on that head.

To this it was answered, that as to the purchaser of the estate, and all claiming under him, the act was final and conclusive; but with respect to the debts, it left them as they were. That the act supposed them really and *bonâ fide* due to third persons, who would therefore have right to the purchase money; but if paid, never meant them to be paid a second time; nor Sir James M'Kenzie, under a pretence thereof, to appropriate to himself the money for discharge of debts, which were either fictitious, or could not from their nature affect the entail. And that whether he had or had not done so, was a question no ways affected by the act.

The interlocutor of the Lord Ordinary was reversed by the Court of Sessions.

Upon an appeal to the House of Lords, it was contended that the recital of the debts in the act was all the information and suggestion of the parties. The enacting part, so far as it directed the discharge of those incumbrances out of the purchase money, only pursued the recital; which, if ill founded, from the misinformation of the parties, was not conclusive: and though the appellant, by having given his consent to the act, might be thought concluded; yet being drawn into such contract by Sir James M'Kenzie's misrepresentation of the true state of the debts who misled both the remainder-men and the legis-

lature; he had a right, as against Sir James's representative, to inquire into the reality of the debts, and application of the purchase money. Nor could a consent, thus fraudulently obtained, any more stand in the way of the relief he sought, than it would in case of an ordinary transaction.

On the other side it was insisted that the debts and incumbrances specified in the act of parliament must be taken as they were recited between the parties to the act; for though a saving clause was inserted for the rights of those who were not parties, yet it was a binding law to those who were. The act directed the money arising by the sale of the lands and barony of Roystoun to be applied in payment of the debts, the amount of which was particularly stated; and the surplus only was to be laid out in the purchase of lands, to be settled in the order and course of succession provided by the entail.

The House of Lords ordered, that the interlocutor complained of in the appeal should be reversed; and that the interlocutor of the Lord Ordinary should be affirmed: and ordered that the Court of Sessions should proceed thereupon according to justice and the rules of that Court.

53. The doctrine laid down by Sir William Blackstone has been fully confirmed by the following modern case, in which the Court of Chancery relieved against the express words of a private act of parliament.

Biddulph v. Biddulph, Rep. Office, Book A. 1790. pa. 296.

54. Simon Biddulph by his will, made in 1730, devised his real estates, which he had charged with the payment of several sums of money, to trustees, upon trust to raise and pay all such debts as he should owe at the time of his decease, or so much thereof as his personal estate should not extend to pay; and to settle and assure the residue to his grandson Theo-

philus Biddulph for life, without impeachment of waste, remainder to his first and other sons successively in tail, with several remainders over.

Simon Biddulph died in 1736, leaving the said Theophilus Biddulph his heir at law; who entered into possession, under the will of Simon Biddulph, of all the estates whereof he died seised; and upon the death of Sir Theophilus Biddulph of Lapley, in 1748, he became a baronet, and entered into possession of other estates, whereof Simon Biddulph had the reversion, expectant on the death of Sir T. Biddulph of Lapley, which were of considerable value, and charged with the payment of several sums of money; but the rents thereof were sufficient to keep down the interest of the incumbrances affecting the same.

By a private act of parliament passed in 27 Geo. II. intituled, "An Act for the sale of the settled estates of Sir Theophilus Biddulph, baronet, in the county of Stafford, &c. for raising money to discharge incumbrances affecting the same; and for laying out the surplus in the purchase of other lands, to be settled to the uses therein mentioned;" after reciting the several incumbrances on the said estates, and that the said Sir Theophilus Biddulph had, out of his own money, raised and paid off 2,819*l.* 4*s.* or thereabouts, being the deficiency of the personal estate of Simon Biddulph, in the discharge of the remainder of his debts, which remained due to the said Sir Theophilus Biddulph, and charged on the settled estates, with a considerable arrear of interest; and reciting that it would be for the benefit and advantage of Sir T. Biddulph, and of all the persons claiming under the will of Simon Biddulph, if the incumbrances affecting the settled estates, which carried a high interest, were paid off and discharged, which could only be done by

sale of part of the settled estates; and therefore the said Sir T. Biddulph and all persons claiming under the will of the said Simon, were desirous and had agreed that certain parts of the estate should be sold for that purpose, freed and discharged from the said incumbrances; and that the surplus of the money, after payment of the incumbrances, should be laid out in the purchase of other lands, more contiguous to the estate, to be settled to the uses of the will of Simon Biddulph. It was therefore enacted, that the said estates should be vested in trustees, their heirs and assigns, free from the trusts therein mentioned, in trust, with the consent of Sir T. Biddulph, to sell the same, and to apply the money in payment of the incumbrances, *and all interest which should be then due and owing for the same*; and also in payment of the said sum of 2,819*l.* 4*s.* due to Sir T. Biddulph, *together with all interest that should have accrued due for the same to the time of the payment thereof*; and to lay out the remainder of the money in the purchase of lands, to be settled to the uses of Simon Biddulph's will.

The trustees who were named in the act of parliament did not act, and new trustees were appointed. Sir T. Biddulph himself sold the estates, and paid off the incumbrances, and also paid or took credit to himself for what was due on account of interest; and laid out the residue in the purchase of lands, which he settled to the old uses.

Theophilus Biddulph, the eldest son of Sir T. Biddulph, filed his bill in Chancery against his father, and the trustees, stating the above facts, and that there remained a balance in the hands of the trustees of 7,207*l.*, which had not been invested in the purchase of lands, according to the directions in the act; and the plaintiff being entitled to an estate

tail, expectant on the estate for life of his father, in the land to be purchased, he prayed that the said sum of 7,207*l.* might be laid out in the purchase of lands, to be settled to the old uses.

Sir T. Biddulph by his answer admitted that he, acting for the trustees in the act, did, out of the money arising from the sale of the estates which were sold under the act, pay and apply not only so much as was necessary to discharge the incumbrances affecting the estates, but also all such interest as was due and owing on the said incumbrances at the respective times when the same were paid off; namely, as well such interest as was due and owing on the said incumbrances at the time when the defendant came into possession of the estates, as what afterwards accrued; the same being directed by the act. And submitted that such payments of interest were respectively made, as being directed by the act; and that there being such directions in the act for payment of all interest, the defendant, as tenant for life, was not bound to keep down the interest of the incumbrances, from the time he came into possession of the estates; and that the act of parliament was not a fraud upon the plaintiff and the persons interested in the estates; and that the defendant ought not to make a compensation for such interest, as required by the plaintiff's bill. But admitted that the rents and profits of the estates which were charged with the said incumbrances were more than sufficient to answer the interest of the incumbrances; and said he did not, in suing for and obtaining the act of parliament, intend any fraud on any of the persons who were to become interested in the said estates after him; and said that the interest which accrued, after he came into possession of the said estates, amounted to 7,207*l.*; and stated the sums

of money paid and laid out in lands; and said there did not remain any money to be invested in land, all the money having been fully and properly applied, pursuant to the directions of the act; and submitted that he was not compellable to make any compensation for such trust monies.

Upon hearing counsel, and it being admitted that the said sum of 7,207 *l.* was received by the said Sir T. Biddulph for rents and profits of the estates in question, of which he was tenant for life, and which ought to have been applied in keeping down the interest of the incumbrances affecting the said estates; and it being admitted, that all the expences of the act, and all the expences anterior to the money being laid out in land, had been paid; it was ordered and decreed, that the defendant, Sir T. Biddulph, should pay the sum of 7,207 *l.* into the Bank, in the name of the accountant-general, in trust, in the cause, to be laid out in the purchase of lands agreeable to the act of parliament.

TITLE XXXIV.

KING'S GRANT.

1. *Nature of.*
7. *Grants of Franchises.*
9. *Of Offices.*
10. *Of Crown Lands.*
22. *Of the King's private Property.*
24. *Of Lands acquired by Escheat, or Forfeiture.*
25. *How King's Grants are construed.*
29. *What passes by general Words.*
37. *Where the King is deceived.*
43. *Exceptions.*

SECTION 1.

THE second kind of assurance by matter of record, is a grant from the King to a subject; for it is a rule of the common law, that the King can only give by matter of record: therefore the King's grants are contained in charters, or letters patent under the great seal, enrolled; and usually directed or addressed by the King to all his subjects. Nature of. Bro. Ab. Tit. Prerog. pl. 71.

2. Lord Coke says, where the King's grants concluded with the words *hiis testibus*, they were called *chartæ*, or charters; and where they concluded with the words *teste me ipso*, they were called letters patent, being so named in the clause—*In cujus rei testimonium has literas nostras fieri fecimus patentes.* 2 Inst. 78.

3. The King's letters patent under the great seal of England need no delivery, nor his grants under the great seal of the Duchy of Lancaster, for they are sufficiently authenticated and completed by the annexing of the respective seals to them.

4. By the statute 13 Eliz. c. 6. it is enacted, that an exemplification of the enrolment of any letters patent, granted from the 4th February, 27 Hen. VIII.

or thereafter to be granted, shall be of as good force, to be shown and pleaded in behoof of the patentees, their heirs and assigns, and every other person having any estates from them, as if the letters patent themselves were produced.

Page's Case, 5 Rep. 52.

2 Comm.346. 5. There are a variety of offices, communicating in a regular subordination, one with another, through which all the King's grants must pass, and be transcribed and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted.

6. It will only be necessary here to treat of those grants by which the Crown gives something that falls within the description of real property, such as franchises, offices, and lands.

Grants of Franchises. Tit. 27. § 83. 7. It has been stated in a former Title, that all franchises in the hands of private persons are derived from grants by the Crown: but that ancient grants of franchises are not sufficient without an allowance of them before justices in eyre.

8. The Crown may still grant fairs, markets, parks, warrens, &c.; though no grants of parks, warrens, and free chase, have been made for some centuries.

Of Offices. 9. There are a variety of offices held immediately under the Crown, which can only be granted by letters patent. And it has been stated, that each of these offices must be granted with all its ancient rights and privileges, and every thing incident to it.

Tit. 25.

10. It is somewhat doubtful whether our Kings were formerly enabled to alien the Crown lands; for although the Conqueror and his sons granted away great estates to their subjects, yet these were forfeitures. In process of time, however, our Kings certainly exercised the right of granting the Crown

lands at their pleasure. But the exercise of this prerogative having greatly impoverished the Crown, it has been restrained by several modern laws.

11. By the statute 1 Anne, stat. 1. c. 7. § 5. it is enacted, "That all and every grant, lease, or other assurance which, from and after the 25th March 1702, shall be made or granted by her Majesty, her heirs or successors, Kings or Queens of this realm, under the great seal of England, Exchequer seal, seals of the duchy and county palatine of Lancaster, or any of them, or by copy of court-roll, or otherwise howsoever, of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches and vicarages only excepted) within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, or any of them, or any part thereof, then belonging or thereafter to belong to her Majesty, her heirs or successors, or to any other person or persons in trust for her Majesty, her heirs or successors, in possession, reversion, remainder, use, or expectancy, whether the same were or should be in right of the Crown of England, or as part of the principality of Wales, or of the duchy or county palatine of Lancaster, or otherwise howsoever, to any person or persons, body politic or corporate whatsoever, whereby any estate or interest whatsoever, in law or equity, shall or may pass from her Majesty, her heirs or successors, shall be utterly void and of none effect; unless such grant, lease, or assurance be made for some term or estate not exceeding 31 years, or three lives, or for some term of years determinable upon one, two, or three lives; and unless such grant, lease, or assurance respectively be made to commence from the date or making thereof;

and if such grant, lease, or assurance be made to take effect in reversion or expectancy, that then the same, together with the estate or estates in possession, of and in the premises therein contained, do not exceed three lives or the term of 31 years in the whole; and unless such grant, &c. be so made that the tenant be liable to punishment for waste; and unless there be reserved upon every such grant, lease, or assurance respectively, the ancient or most usual rent, or more, or such rent as had been reserved, yielded and paid for such of the said manors, messuages, lands, tenements, rents, tithes, or other hereditaments as shall be therein contained, for the greater part of 20 years before the making thereof; and where no such rent shall have been reserved or payable, that then upon every such grant, lease, or assurance there be reserved a reasonable rent, not being under the third part of the clear yearly value of such of the said manors, messuages, lands, tenements, tithes, or other hereditaments as shall be contained in such lease or grant; and unless such respective rents be made payable to her Majesty, her heirs or successors, who shall make such lease or grant, and to her or their heirs or successors, during the whole term or time of the continuance thereof respectively."

12. By the sixth section of this statute it is provided, that where the greater part of the yearly value of any tenements shall consist of the buildings thereon, which may want to be repaired or re-edified, the Crown may demise such tenements for 50 years or three lives, to commence from the date of the lease; or if in reversion, then the same, with the estate in possession, not to exceed 50 years or three

lives; and be dispunishable for waste: and so as such rent be reserved, as is required in the preceding section.

13. By the 8th section of this statute it is provided, that this act shall not extend to disable the Crown from making such leases, copies, or grants, as it might make under the statute 12 Will. III. for making leases or copies of offices, lands, or hereditaments, parcel of the duchy of Cornwall; "or to disable her Majesty, her heirs or successors, to make any grant or restitution of any estate or estates thereafter to be forfeited, for any treason or felony whatsoever; or to disable her Majesty, her heirs or successors, to grant, demise, or assign any lands, tenements, or hereditaments which should be seised or taken into her or their hands upon any outlawry at the suit of her or their subjects, as had been usual; or any estate whatsoever which was or should be seised, extended, or taken in execution for any debt owing or to be due to the Crown, as she or they should think fit; or to make any grants or admittances which of right or custom ought to be made, of any copyhold lands, tenements, or hereditaments, parcel of any manor or manors of her Majesty, her heirs or successors."

14. By the statute 34 Geo. III. c. 75. the 6th section of the statute 1 Anne is repealed, and it is enacted, (sect. 3.) that where any Crown lands shall be deemed by the commissioners of the Treasury fit and proper for the erection of houses or other buildings, and where the lessees shall agree to erect buildings thereon of greater value than the land so to be leased, or where the greatest part of the yearly value of such tenements shall consist of buildings; it shall be lawful for the Crown to demise the land

for 99 years or three lives, from the making of such lease; or if such lease be made in reversion, then that the estate granted, together with the estate in possession, shall not exceed 99 years or three lives: and so as the rents reserved be not less than two thirds of the reasonable rent for such buildings: and so as there be paid to the Crown a fine to the amount of the remaining part of such annual sum, subject to a discount, not to be computed at a higher rate than the highest rate of interest at the time: and when there shall happen to be no building upon the land to be demised, or that the buildings thereon shall be agreed to be rebuilt, or other new buildings to be erected, then there shall be reserved such annual rent as shall be deemed reasonable, without taking any fine: and so as in every lease last aforesaid there be contained a covenant on the part of the lessee for erecting houses or other buildings thereon, and for keeping them in repair: and so as the rents be reserved free of all manner of taxes, during the whole of the term: except such rent as the Treasury shall think fit to be allowed, not exceeding the term of three years: and so as the lessees execute counterparts of such leases.

15. By the fourth section it is enacted, that on every grant or lease to be made by the Crown, (advowsons and such grounds with buildings thereon as are authorized to be granted for 99 years or three lives, and whereon any fine shall be payable, only excepted,) there shall be reserved such clear annual rents, as shall be deemed by the Treasury to be reasonable, without taking any fine; and such rent shall be payable during the whole term; and no such lease shall be good in law, unless the lessees execute a counterpart thereof.

16. By the 5th section it is enacted, that it shall not be lawful to renew any such lease for any term of years whatever, until within five years of the period of its expiration; except such tenements as are thereby authorized to be granted for 99 years; nor to renew any lease for 99 years, until within 20 years of the expiration of the same; nor any lease for lives, so long as there shall be more than one of such lives in being, except in the cases before mentioned.

17. By the 7th section it is provided, that where any wastes or commons, in which the Crown has any interest, shall be deemed fit to be inclosed, and shall be by authority of parliament, or otherwise, authorized to be inclosed; or where any lands, held under a lease from the Crown, shall be deemed by the treasury fit and expedient to be planted, and appropriated to the growth of timber, or any farm-house to be erected, or any pits to be sunk, for the working of mines, quarries, or collieries; and where the term or estate in possession shall be deemed by the Treasury to be insufficient to repay the costs of such improvements; in every such case it shall be lawful to renew any such lease, or to grant any further lease, for any term or estate not exceeding the terms or estates authorized by the act of 1 Anne, or by this act. And where any houses or other buildings shall require, or shall be agreed to be rebuilt, it shall be lawful to grant any further lease of such houses or other buildings, for any term or estate not exceeding the terms or estates authorized by this act: provided such rents are reserved as are required by this act; and that covenants be inserted for erecting such new houses or buildings.

18. By the 8th section it is enacted, that before the making of any grant or lease, a survey of the premises, where the same shall be capable of such survey, and an estimate of the improved annual value thereof, shall he had and made by a practical surveyor, under the direction of the Treasury; who shall certify, by his report in writing under his hand, what is the true and fair improved annual value of the estate so surveyed and valued, and the true and fair annual value of the buildings, and the true state and condition of such buildings, and for what term of years it shall be most beneficial to grant such buildings or ground: and such survey and valuation shall be verified by the oath of such surveyor.

19. By the 9th section it is provided, that where any tenements shall be of a known fixed and unimprovable value; or where, from the nature of such tenements, the annual value thereof cannot be ascertained by means of a survey; or where the value of such tenements is small; a lease thereof may be renewed without a survey thereof.

20. By the statute 39 & 40 Geo. III. c. 86., for the better preservation of timber in the New Forest, and for ascertaining the boundaries of the said forest, and of the lands of the Crown within the same, it is enacted by the 7th section, that if the commissioners shall find any land belonging to the Crown, which has been for 15 years inclosed and enjoyed without interruption, and which has been improved, they may grant a lease thereof for such term of years as shall appear to the commissioners a reasonable compensation for the expence of improvement.

21. By the 28th section it is enacted, that the commissioners may treat for the sale of small parcels of land, belonging to or claimed by the Crown, which

are intermixed with the land of individuals, and are not valuable for the purpose of the forest; but such lands to be sold shall not exceed in any instance the value of 500*l.*

Of the King's Private Property.

22. By the statute 39 & 40 Geo. III. c. 88. it is enacted, "That none of the provisions and restrictions contained in the acts of 1 Anne and 34 Geo. III. shall extend to any manors, messuages, lands, tenements, or other hereditaments, of whatsoever tenure the same may be, which had at any time theretofore been purchased by his Majesty, or should at any time thereafter be purchased by his Majesty, his heirs or successors, out of any monies issued and applied for the use of his or their privy purse; or with any other monies not appropriated to any public service; or to any manors, messuages, lands, tenements, or other hereditaments, of whatsoever tenure the same may be, which came to his Majesty, or may come to him, his heirs or successors, by the gift or devise of, or by descent or otherwise from, any of his, her, or their ancestors, or any other person or persons not being Kings or Queens of the realm; and that the same should operate to all intents and purposes as from the birth of his Majesty."

23. By the 4th section it is enacted, that it shall be lawful for the King, his heirs and successors, from time to time, by any instrument under his and their royal sign manual, attested by two or more witnesses, at his and their free will and pleasure, to grant, sell, or give, all and every or any of the manors, messuages, lands, tenements, and hereditaments so purchased, or to be purchased, or which had or should come to his Majesty, his heirs or successors, as aforesaid, whether of freehold, or copyhold, or customary, or leasehold tenure, and whether conveyed or assured

to, or otherwise vested in his Majesty, his heirs or successors, as aforesaid, to any person or persons, for any estate or estates, or for any intents or purposes, as any of his Majesty's subjects might grant, sell, or give the like manors, &c.; and all persons seised of any manors, &c., or any estate therein, in trust for his Majesty, his heirs or successors, shall convey, surrender, assign, or otherwise assure the same, in such manner as his Majesty, his heirs or successors, under his or their royal sign manual, to be attested as aforesaid, shall direct.

Of Lands acquired by Escheat or Forfeiture.

24. By the statute 47 Geo. III. c. 24., reciting the preceding statute, and that doubts existed, whether the powers therein given extended to lands which had or might come to his Majesty, his heirs or successors, in right of his duchy of Lancaster, or by reason that the same had been purchased by or for the use of or in trust for any alien or aliens; and whether the same extended to enable his Majesty to grant any rents, or arrears of rent, accrued in respect of any manors, &c. before any grant thereof under the said act, it is enacted, "That in all cases in which his Majesty, his heirs or successors, hath or shall, in right of his Crown, or of his duchy of Lancaster, become entitled to any freehold or copyhold manors, &c., either by escheat for want of heirs, or by reason of any forfeiture, or by reason that the same had been purchased by or for the use of, or in trust for any alien or aliens, it shall be lawful for his Majesty, his heirs and successors, by warrant under his or their sign manual, or under the seal of the duchy of Lancaster, according to the nature of the title to such manors, &c., to direct the execution of any trusts or purposes to which the same may have been directed to be applied; and to make grants of

such manors, &c., or of any rents or profits then due and in arrear to his Majesty, in respect thereof respectively, to any trustee or trustees, or otherwise for the execution of any such trusts or purposes; or to any person or persons, for the purpose of restoring the same to any of the family of the person or persons whose estates the same had been; or of carrying into effect any intended grant, conveyance, or devise of any such person or persons, in relation thereto; or of rewarding any person or persons making discovery of any such escheat, or of his Majesty's right and title thereto, as to his Majesty, his heirs or successors respectively, shall seem fit."

How King's Grants are construed.

25. The King's grants are construed in a very different manner from conveyances made between private persons; for, being matter of record, they ought to contain the utmost truth and certainty. And as they chiefly proceed from the bounty of the Crown, they have at all times been construed most favourably for the King, and against the grantee, contrary to the manner in which all other assurances are construed. Plowd. 243.

26. Thus, if the King grants lands, or a rent issuing out of them, to A. B., without any limitation of estate, the grantee will only take an estate at will, on account of the uncertainty; whereas, in the case of a grant by a subject, an estate for life would have passed. Tit. 32. c. 19. § 14.

27. King Henry VIII. granted lands to Lord Lovel, to have and to hold to him and to his heirs male; and it was adjudged void: for the King could not grant such estate of inheritance in fee simple, to make the males to be inheritable, and exclude the females. But in the case of a private person, such a grant would have passed an estate in fee simple. 1 Rep. 43 *b*. Tit. 32. c. 21 § 21.

Case of Mines. Plowd. 336. 1 Rep. 46 *b.* 52 *a.*

28. The King's grant shall not be taken to a double intent. Thus, if the King grants lands, and the mines therein contained, it will only pass common mines, and not mines of gold or silver; for the common intent of the grant is satisfied by the passing of mines of coal, lead, &c.

What passes by General Words.

29. By the statute *Prerogativa Regis*, 17 Edw. II. c. 15. it is declared, that when the King gives or grants lands or manors, with the appurtenances, unless he makes express mention in the deed of knights' fees, advowsons of churches, and dowers, when they fall, then the King reserves to himself such fees, &c.; although among other persons it had been observed otherwise.

10 Rep. 64 *a.*

Idem.

30. It has been held, that this act is restrained to the three cases of advowsons, knights' fees, and dower; for a court-leet will pass without express words. So of a forest appendant to a manor; and the words of the act being *quando dominus rex dat vel concedit*, in cases of restitution, advowsons, &c. will pass without any express mention of them.

31. When the grant of the King in general terms refers to a certainty, it is the same as if the certainty had been expressed in the grant, though such certainty be not of record, but lie in averment by matter in *pais*, or in fact.

Whistler's Case, 10 Rep. 63.

32. Queen Elizabeth, being seised in fee *jure coronæ* of the manor of Whitchurch, to which an advowson was appendant, granted the manor, with the appurtenances, for 21 years, excepting the advowson; and afterwards, reciting the said demise and exception, she made another grant to the same grantee, for another term of years, with the like exception. King James I., in consideration of services, *ex certa scientia*, &c., granted the manor, *cum*

suis juribus, &c. to G. H., *exceptis quæ in eisdem litteris patentibus excipiuntur*; and mentions the lease in reversion, and the like exception therein; but then follows this clause—*Et ulterius de uberiori gratia nostra, et ex certa scientia, &c., damus omnia et singula tenementa prædicto manerio quoque modo spect. &c., et uberius damus, &c.* to the said G. H. and his heirs, the said manor, *ac cætera omnia et singula præmissa, cum eorum pertinentiis adeo plene, &c.* as the same came to him, and they were in his hands. It was resolved, 1st. That the advowson passed, because it was clearly referred to in the grant. 2d. That if the words *adeo plene et integre* had been omitted, then it would not have passed by the first clause; but by the addition of the last clause, all the parts of the patent taking effect at one and the same time, the advowson should pass as appendant. 3d. Though the first clause of the grant referred to the demise in which the advowson was excepted, yet by the middle clause all tenements, &c. pertaining to the said manor were granted; and the last clause granted the manor, with the appurtenances, &c. *adeo plene*, &c.

33. The manor of Laburn, to which an advowson was appendant, came to King Hen. VIII. by the dissolution of the monasteries, who granted the manor to the Archbishop of Canterbury, excepting the advowson; and afterwards the archbishop re-granted the same to the King, together with the advowson; and then the King granted the manor of Laburn, *et advocationem ecclesiæ de Laburn, dicto archiepiscopo dudum spect.*, and which was re-granted to the said King by the said archbishop, and formerly belonging to the abbot of Grey Church, &c., *adeo plene* as the said archbishop or abbot had it, or as it was in our hands, by any ways or means howsoever. Rex v. Episc. Rochester, 2 Mod. 1.

The question was, whether the advowson passed by this grant.

Ellis, Just. said, the general words *adeo plene*, as the King had it by any ways or means whatsoever, were sufficient to pass it: and judgement was given accordingly.

Lee v. Browne, Freem. 207.

34. Where general words do not refer to any certainty, they will not, in grants by the Crown, pass any thing.

Fishery of the Banne. Davies, 55.

35. In the river Banne, in Ulster, where the stream is navigable, there is a rich fishery of salmon, which was parcel of the ancient inheritance of the Crown. In the first year of King James I., Sir Randall Macdonnell obtained a grant to him and his heirs, by letters patent, of the territory of Rout, which is adjoining to the river Banne, in that part where the fishery is: by these the King granted to him, *omnia castra, messuagia, tofta, molendina, terras, prata, pascua, piscarias, piscationes, acquas, aquarum cursus, &c. ac omnia alia hæreditamenta in vel infra dictum territorium de Rout, exceptis et ex hac concessione nobis hæredibus et successoribus nostris reservatis, tribus partibus piscationis fluminis de Banne.*

It was resolved by the Judges of Ireland, that no part of the fishery passed by these letters patent; that no part of this royal fishery could pass by the grant of the land adjoining, by the general grant of all fisheries; for this royal fishery was not appurtenant to the land, but was a fishery in gross, and parcel of the inheritance of the Crown by itself; and general words in the King's grants shall not pass such special royalty, which belongs to the Crown by prerogative; for mines royal, amerciaments royal, or escheats royal, should not pass by general words, of all mines, amerciaments, and escheats.

Plowd. 333.

It was also agreed, that where the King granted to Sir R. M. all the territories adjoining to the river, and all fisheries within the territory, *exceptis tribus partibus piscariæ de Banne*; the fourth part of the fishery should not pass to him, for the King's grant should pass nothing by implication. Att. General v. Turner, 2 Mod. 106.

36. If the King grants the manor of D. with the appurtenances, and all other lands, pastures, woods, *et hæreditamenta ante hac cognita, usitata, accepta, vel reputata, ut membrum vel parcella manerii prædicti*; a wood which was not parcel of the manor truly, and in right, that is, *in facto et jure*, shall not pass though it be averred that the said wood, *adhunc antea fuit reputat' et parcel' manerii prædicti*; without saying that it had been reputed parcel, time out of mind. And if it had been averred that the wood was reputed parcel of the manor, time out of mind, &c., though in the case of a common person, proofs of such issue might be by vulgar and diffused reputation of people of the same vill, or of other manors or vills adjoining, &c., or of the body of the county; yet in the case of the King, in such issues, as to the word reputation, the evidence or proof should not be by such vulgar and diffused reputation of the people; but the proofs ought to be by some matter of record or writing, as by the express valuation of it, between the prince and his subject, in the particulars of the purchase; or in the surveys and books of accounts of the auditors and receivers, bailiffs, and such officers and ministers, always entered and answered in the rolls and books, as parcel of the manor; otherwise it was not any proof of reputation in the case of the King. Rex v. Imber & Wilkin, 2 Roll. Ab. 186.

37. Whenever the King is misinformed in the nature of his estate, so that his intent cannot take

effect; or where in a grant there is such a misrecital, non-recital, false surmise, or false consideration, as to show that the King was deceived, the grant will be void.

Case of Alton Woods, 1 Rep. 40. Moo. 413.

38. King Henry VIII. being tenant in tail of the manor of Abbottesley, with the reversion to him, his heirs and successors, gave, by his letters patent, the said manor to Walter Walshe, and to the heirs male of his body. The question was, whether this gift was good or not: and it was held that it was void; because the King having only an estate tail himself, could grant only for his own life, for he could not grant a greater estate than he had; so that being ignorant of the estate he was entitled to, he was deceived in granting it.

Curle's Case, 11 Rep. 4.

39. If the King grants an office for life, and after grants it in reversion to B., which is void, and afterwards reciting the grant to B. as a good grant, he grants it to commence after the grant to B.; the King is deceived in this last grant, and therefore it is void.

Mead v. Lenthal, 2 Roll. Ab. 189.

40. If the King recites, that where by letters patent the office of Marshal of the Court of King's Bench was granted to J. S. for life; and that the said J. S. had surrendered it; and that in consideration of this surrender, the King granted the office to J. D. for life. If the office was not in fact granted to J. S., or if he did not surrender it, the grant to J. D. will be void, because there was no such considerations as were recited.

Green's Case, 6 Rep. 29.

41. Queen Elizabeth having right to present to a living as patroness, by letters patent, granted the presentation *ratione lapsus*; it was held void, because she was deceived as to her title.

Mason v. Chambers. Cro. Ja. 34.

42. It is laid down by Popham, that if the Crown should let the manor of D., *quod quidem manerium* is

of the annual value of 4*l.*, where it is not let for such a rent, and the rent or value is misrecited, yet the lease would be good, because there was a certainty before; and the addition of *quod quidem*, &c. was not material. But if the Crown let the manor of D. of the annual rent of 4*l.*, which was intended to be of such a value, and was let at a greater rent, or appeared upon record to be of a greater value, it would be void: because in the first case the Crown intended to pass the manor; and the addition of the *quod quidem, &c.* was but to add another certainty: but when it was in one sentence, that it was of such a value, and that *in tali parte* the intent of the Crown appeared not to grant a thing above such a value, it was otherwise.

Exceptions. Tit. Prerog. F. 2.

43. In Bacon's Abridgement the following exceptions are laid down to the above cases: "First, that in the construction of letters patent, every false recital in a part material will not vitiate the grant, if the King's intent sufficiently appears."

Rex. v. Epis. Chester, Ld. Raym. 292. Show. Parl. Ca. 212.

44. Thus where the King made a grant to a person as a knight, who in fact was not a knight, though the grant was held void, for this reason, by the Court of King's Bench, yet the judgement was reversed by the House of Peers.

45. "Secondly, that if the King is not deceived by the false suggestions of the party, but only mistaken by his own surmises, this will not vitiate his grant."

Rex v. Kempe, Ld. Raym. 49.

46. King Charles II. granted the office of searcher at Plymouth to John Martin, *durante bene placito*; afterwards by other letters patent, reciting the grant to Martin, he granted this office to Fryer for life, to commence after the death, surrender, or forfeiture of Martin. Fryer afterwards surrendered his letters

patent to the King, who, in consideration of the surrender, granted the office to Henry Kempe for life, to commence after the death, surrender, forfeiture, or other determination of the estate of Martin; and afterwards to William Kempe for life, to commence after the death, surrender, forfeiture, or other determination of the estates of Martin and Henry Kempe.

Upon the death of King Charles II. a *scire facias* was sued out to repeal these letters patent. Sir S. Eyre, Just. said it was objected that the King was deceived in his grant to Fryer, which was to commence after the death, surrender, or forfeiture of Martin; for the estate of Martin being only an estate at will, it could not be surrendered or forfeited; because those acts, which in cases of other particular estates would amount to a forfeiture or surrender, in case of an estate at will, amounted to a determination of the will; and therefore there could not be a surrender or forfeiture of an estate at will. And in fact the estate of Martin did not determine by his death, surrender, or forfeiture, but by the death of King Charles II.; and therefore the grant to Fryer could not take effect, because Martin's estate did not determine by his death, surrender, or forfeiture.

To answer which objections he said that it ought to be considered, 1°. When the King shall be said to be deceived, to avoid his grant. 2°. In what manner the grant of the King should take effect; and what construction it should have.

As to the first, where the matter expressed to be suggested on the part of the grantee was false, and to the prejudice of the King; there if the King was deceived, that would avoid the grant. But

where the words were the words of the King, and it appeared that he had only mistaken the law; there he should not be said to be deceived, to the avoidance of the grant: as if there was an estate *in esse* not recited; or when the grant was recited to be of less value than it actually was, by the suggestion of the party; there the King was deceived, and the grant should be void. For, in the first case, the intent of the King was to grant an estate to take effect in possession, which intent could not take effect, because there was an estate before *in esse*, not recited. In the second case, if the grant were good, the King would grant more than he had designed to do. But if the King was not deceived in his consideration, nor otherwise to his prejudice; but his intent was to pass the lands, only he was deceived in the law; nevertheless his grant should be good.

2°. In what manner the letters patent of the King should be construed, when he was mistaken in his own words and affirmation. And he said that it was a *rule* in law, that where the King was not deceived by the suggestion of the party; and it appeared by the letters patent, that the intent of the King was, that the patentee should take; such construction should be made, that the grant should not be void.

To apply this to the case. In the letters patent to Fryer, the King was not deceived, for the precedent letters patent were truly recited, and the suggestion was true; and the intent of the King was, that Fryer should take by these patents; and therefore such a construction ought to be made, as that the grant might take effect.

Lord Holt concurred, and judgement was given that the letters patent were good.

47. "Thirdly, that though the King mistakes, either in matter of law or fact, yet if this is not any part of the consideration of the grant, it will not vitiate it."

Chandos's Case, 6 Rep. 55.

48. King Henry VII. granted to Lord Chandos a manor in tail; and the same King, by other letters patent, reciting the former grant, and that the said Lord Chandos had surrendered the same to be cancelled, and that the same had been cancelled, by reason whereof the King was seised in fee; did grant the said manor to Lord Chandos and his wife, and the heirs of Lord Chandos.

It was contended that the second grant was void.—1°. Because the estate tail was not recited as an estate tail continuing, whereupon the reversion might be granted, but as an estate tail determined; and therefore the King granted it as a thing in possession, when in truth he had but a reversion, expectant on an estate tail. 2°. Because the King was deceived in his grant; for the King, by the suggestion of the party, thought that by the surrender of the first letters patent, the estate tail was defeated and determined, by reason of which the King became seised in fee, in which the King was deceived. 3°. Because the King was deceived in the estate he granted, for he intended to grant an estate in fee in possession, and not a reversion expectant on an estate tail.

After great deliberation, it was resolved that the reversion passed. And as to the said three objections, it was considered how much of the said recital was the suggestion of the party, and how much the affirmation of the King himself. And it was held that the recital of the estate tail, and that the patentee had surrendered, were, in judgement of law, the information and sug-

gestion of the party; but the clause that the King was seised in fee, was the conclusion of the King himself, in which he mistook the law. Also the party informed the King that he had delivered up the letters patent to be cancelled, upon which the King affirmed that they were cancelled: that was not the affirmation of the party, but of the King; and the affirmation of the King, on the information of the party, when it was not made any part of the consideration, should not avoid his grant. And it was not like the case of Alton Woods; for there the King was not informed of his true estate, and his grant could not take effect, without fraction of estates, or wrong done. ante, § 38.

49. "Fourthly, that the words *ex certa scientia et mero motu*, in the King's charters and letters patent, do occasion them to be taken in the most benign and liberal sense, according to the intent of the King, expressed in his grant."

50. It has been stated that royal mines do not pass by a grant of all mines, minerals, &c. But Lord Ch. J. Dyer has said, that if the Crown has a mine royal in the soil of J. S. and grants, *ex gratia speciali, certa scientia et mero motu*, all mines in the land of J. S., the mine royal shall pass; for else the words would be void, and without effect; because the Crown cannot have a base mine in the soil of another: and therefore when the Crown says, *ex certa scientia*, and recites that it is in the soil of another, it shall not be taken to be misconusant of the thing. ante, § 28. Plowd. 337.

51. There are, however, several cases in which the words *ex certa scientia et mero motu* were not held sufficient to establish the King's grant, as in Lord Lovell's case, which has been already stated. ante, § 27.

1 Rep. 46 *a.*

52. So where King Henry VII. being seised of two manors, Ryton and Condor, granted *ex certa scientia et mero motu totum illud manerium de Ryton & Condor, cum pertinen', in com' Salopiæ*; it was held that the grant was void, for the King was deceived.

Id. 46 *b.*

53. In the same manner where Queen Elizabeth, being seised of the manors of Milburn and Sapperton, in the county of Lincoln, granted, *ex certa scientia, &c. totum illud manerium de Milborn cum Sapperton, in com' Lincoln';* it was held that neither of them passed.

54. "Fifthly, that though in some cases general words of a grant may be qualified by the recital, yet if the King's intent is plainly expressed in the granting part, it shall enure according to that, and is not to be restrained by the recital."

10 Rep. 65 *b.*

4 Rep. 34.

55. In Bozoun's case, 26 and 27 Eliz., it was held that a clause of *non obstante* would supply the defect of a misrecital; and this doctrine was confirmed in the following case.

Att. General v. Hungate, Hard. 231.

56. King Henry VIII. granted the manor of Sherborn, in the county of York; and then followed these words: "all which are of such a yearly value as is expressed in such a particular," with a *non obstante* of any misrecital of the true value, or that they were of greater value. The value was not truly expressed in the particular.

Lord Ch. B. Hale held the grant good. He said that the reason why a mistake in the consideration, or in the King's title, or the non-recital of an estate, or lease in being, shall vitiate the King's patent, was, because by his prerogative he ought to be truly informed of his case; but it was otherwise

in the case of a common person, whose grant was to be taken most strongly against himself; and here the *non obstante* aided those defects, and it was the proper office of a *non obstante* to do so, as appeared in Bozoun's case.

TITLE XXXV.

FINE.

CHAP. I.

Of the Origin and Nature of Fines.

CHAP. II.

Of the Manner of levying Fines.

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Of the several Sorts of Fines.

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Effect of Fines at common Law, and by the Statutes 18 *Edw. I.* 27 *Edw. I. and* 34 *Edw. III.*

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Effect of Fines by the Statutes 1 *Rich. III.* 4 *Hen. VII. and* 32 *Hen. VIII. in barring Estates Tail.*

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Effect of Fines in barring particular Persons, Estates, and Interests.

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CHAP. XIII.

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CHAP. I.

Of the Origin and Nature of Fines.

1. *Origin of Fines.*
9. *Description of.*
13. *Taken from the Roman Law.*
16. *When first introduced.*

Section 1.

Origin of Fines.

WHEN landed property first became the subject of alienation, it was found necessary to adopt some authentic mode of transfer, which might secure the possession, and evince the title of the purchaser.

2. By the ancient common law, a charter of feoffment was, in general, the only written instrument

whereby lands were transferred or conveyed. But although this assurance derived great authenticity from the number of witnesses by whom it was usually attested, and the solemn and public manner in which livery of seisin was given, yet still it may be supposed that inconveniences would frequently arise, either from the loss of the charter itself, or from the difficulty of proving it after a lapse of years. These circumstances probably induced men to look out for some other species of assurance, which should be more solemn, more lasting, and more easy to be proved, than a charter of feoffment.

3. Experience must soon have discovered that no title could be so secure and notorious, as that which had been questioned by an adverse party, and ratified by the determination of a court of justice. And the ingenuity of mankind soon found out a method of deriving the same advantage from a fictitious process.

4. To effect this purpose the following plan was adopted. A suit was commenced concerning the lands intended to be conveyed; and when the writ was sued out, and the parties appeared in court, a composition of the suit was entered into, with the consent of the Judges, whereby the lands in question were declared to be the right of one of the contending parties.

5. This agreement being reduced into writing, was enrolled among the records of the court, where it was preserved by the proper officer; by which means it was not so liable to be lost* or defaced as a charter of feoffment; and being a record, would at

* There is a record of a fine in Dugdale's *Origines Juridiciales*, p. 92, dated 28 Hen. II., which is expressly mentioned to have been levied, because the charter of feoffment, by which the lands had been conveyed, was lost.

all times prove itself. It had also another advantage: that being substituted in the place of the sentence which would have been given, in case the suit had not been compounded, it was held to be of the same nature, and of equal force, with the judgement of a court of justice.

6. When this species of agreement was completed, a writ issued to the sheriff of the county in which the lands lay, in the same form as if a judgement had been obtained in an adversary suit, directing him to deliver seisin and possession to the person who thus acquired the lands. Glanv. lib. 2. c. 20. Bract. 256 *a*.

7. The form which was first adopted in this assurance has continued ever since. To show the tenor thereof, and the difference between it and the charters which were then in use, it shall be here transcribed from Glanville. Lib. 8. c. 2.

Hæc est finalis concordia facta in curia domini regis apud Westmonasterium, in vigilia beati Petri apostoli, anno regni regis Henrici secundi, tricesimo tertio, coram Ranulpho de Glanville, justiciario domini regis, et coram H. R. W. et T. et aliis fidelibus domini regis qui ibi hunc aderunt, inter priorem et fratres hospitalis Hierusalem et W. T. filium Normanum et Alanum filium suum, quem ipse attornavit in curia domini regis ad lucrandum et perdendum, de tota terra illa et de pertinentiis de qua terra tota placitum fuit inter eos in curia domini regis: scilicet, quod prædictus W. et Alanus concedunt et testantur donationem quam Normanus pater ipsius W. ipsis inde fecit, et illam terram totam quietam clamant de se et hæredibus suis domus hospitalis et prefato priori et fratribus, in perpetuum et per liberum servitium quatuor denariorum per annum pro omni servitio, et pro hac concessione et testificatione et quieta clamantia prefatus

prior et fratres hospitalis dederunt ipsi Wilhelmo et Alano centum solidos sterlingorum.

8. This assurance was called *finis*, or *finalis concordia*, from the words with which it begins; and also from its effect, which is to put a final end to all suits and contentions. Thus Glanville says—*Et nota quod dicitur talis concordia finalis, eo quod finem imponit negotio, adeo ut neuter litigantium ab ea de cetero poterit recedere*; and Bracton says—*Finis est extremitas uniuscujusque rei, et ideo dicitur finalis concordia, quia imponit finem litibus.*

Lib. 8. c. 3.

435 *b.*

Description of.

9. A fine may therefore be described to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the Judges, and enrolled among the records of the court where the suit is commenced, by which lands and tenements are transferred from one person to another; or any other settlement is made respecting them.

10. To this mode of transferring estates of freehold, the ceremony of livery of seisin is unnecessary; not because the supposition and acknowledgement thereof in a court record induces an equal notoriety, for in ancient fines no such acknowledgement is made, but because lands acquired in this manner were supposed to be recovered by sentence of a court of justice; and the possession was delivered by the sheriff, in pursuance of a writ directed to him for that purpose; which was equal in point of notoriety to the ceremony of livery of seisin.

11. A fine was, from its first institution, more highly favoured and protected by the law, than any other kind of assurance; for if either of the parties refused to adhere to it, there was a particular writ, by

which they were compelled to appear, called *querela de fine facto in curia domini regis.* And if the fine was proved to have been duly levied, then the party who refused to adhere to it was attached, till he found sufficient security for his compliance. Glanv. lib. 1. c. 3. lib. 8. c. 3, 4, 5.

12. In some cases, however, the civil authority appears to have been insufficient for this purpose. Thus Mr. Madox has transcribed a record, from which it appears that Julian De Swadefield fined to King John in 100 marks and six palfreys, *per sic quod finis factus per cyrographum, et per finem duelli, inter ipsum et Wilhelmum de Curton, de feodo unius militis et dimidii cum pertin. in Ellingeham, coram justiciariis, teneatur.* Form. Angl. Dissert. § 16.

13. The idea of a fine appears to have been originally taken from the *Transactio* of the Roman law; which was an accommodation of a suit already commenced, or an agreement respecting some doubtful matter, that would otherwise become the subject of a suit; and is thus described—*Transactio est, super re dubia, aut lite incerta, conventio non gratuita, aliquo dato, retento, vel promisso.* Taken from the Roman Law. Cowell's Dict. Fine. Voet Comp. Jur. 61.

14. Although no modern writer on the English law has taken notice of this circumstance, yet the definition of a fine given by Bracton seems to be a proof of it.—*Concordia in foro seculari idem est quod transactio; et est transactio, de re dubia et lite incerta, aliquo dato, vel promisso, vel retento, a lite transactio.* From the similarity of these definitions, it appears clearly that the English lawyer copied from the Roman. Nor should it appear extraordinary, that we are indebted to the civil law for this most useful species of assurance, when we consider how much our first writers, Glanville and Bracton, have borrowed from Justinian's code; although some of the more modern Bract. 310 *a.* Vide Glanv. Prol. & Lib. 7. c. 1. and Selden ad Fletam.

authors appear either to have been ignorant of the obligations we owe to the Romans in this respect, or, from a mistaken pride, to have been extremely unwilling to acknowledge them. Lord Coke, however, appears to have been acquainted with the origin of fines; for, speaking of the etymology of the word fine, he says—"And the civilians call this judicial concord, *transactionem judicialem de re immobili.*

1 Inst. 262 *a.*

15. The word *finis* appears to have been used upon the continent, as synonimous to *transactio*, in the twelfth century; of which several charters, published by Muratori, afford proof. A part of one of them shall be transcribed.—*Transactio inter Gerardum comitem, &c. atque Attonum archiepiscopum Pisanum, anno* 1121. *In Eterni Dei nomine, Amen. Breve recordationis qualiter Gerardus Comes, &c. finem fecit et transactionem Gratiano vicedomino ad partem ecclesiæ archiepiscopatus Sancte Marie et Vice Atteni ejusdem ecclesie archiepiscopo, &c. de quinque partibus integris de Curte de Bellora, &c.*

Antiq. Med. Æv. Tom. 9. 449.
Id. 463. 487.

16. It has been a favourite topic with our lawyers, to enlarge on the antiquity of fines. Some have carried this idea so far as to insist, that they were coeval with the first rudiments of the common law; and formed an original assurance. Others have contended, that fines were well known in this kingdom before the Norman conquest.* But if it be admitted that the first idea of a fine was derived from the Roman jurisprudence, and we trust this fact has been

When first introduced.

Co. Read. 1 Plowd. 368.

* It was not unusual, in the Anglo-Saxon times, for persons to execute contracts in the county-court, where they were witnessed; of which Hickes, in his *Dissertatio Epistolaris*, p. 29, 30, published with the *Thesaurus Linguarum Septentrionalium*, has produced two instances; but they bear no sort of resemblance to fines.

fully proved, it will follow that fines could not possibly have been known in England until some time after the year 1130, when a copy of the Pandects was found at Amalphi, in Italy. In consequence of which discovery, the study of the Roman law spread with uncommon rapidity over all Europe, not excepting this island, in which Roger, sirnamed Vacarius, who was brought over here by Theobald, a Norman abbot, elected to the see of Canterbury in the year 1147, read public lectures at Oxford on the Roman law.

Selden ad Fletam, c. 7. § 3.

17. As a farther proof of this assertion, it may be observed, that Dugdale and Madox, two of the most diligent and learned inquirers into our ancient records and charters, have acknowledged that they could not discover any traces of fines in this country before the time of Henry II., who ascended the throne in 1155; that is, 34 years after the introduction of the Roman jurisprudence. So that there can scarce remain a doubt but that fines were first introduced into England during the reign of King Stephen, or that of his immediate successor, King Henry II., and that we are indebted to Justinian's code for this assurance.

Orig. Jur. 92. Form. Ang. Dissert. § 15.

TITLE XXXV.

FINE.

CHAP. II.

Of the Manner of levying Fines.

1. *Ancient Manner of levying Fines.*
8. *Present Manner.*
12. *Original Writ.*
22. *Licentia Concordandi.*
23. *King's Silver.*
33. *Concord.*
41. *Similar to a Judgement.*
51. *Note.*
52. *Chirograph.*
58. *All the Proceedings on Fines must be recorded.*
60. *No Averment against the Record of a Fine.*
63. *Exception.*
64. *Motions to prevent Fines from being completed.*
67. *Felony to acknowledge a Fine in the Name of another.*
68. *When a Fine is completed.*
72. *When it begins to operate.*
78. *Of the Proclamations.*

Section 1.

Ancient Manner of levying Fines.

A FINE has, in the preceding chapter, been described to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the Judges, and enrolled among the records of the court where the suit was commenced; by which lands and tenements are transferred from one person to another, or any other settlement is made of them.

2. There is some difficulty in ascertaining the manner in which fines were originally levied, on account of the scarcity of materials for such an inquiry; for, except what is to be found in the Disser-

tation which Madox has prefixed to his collection of Ancient Charters, and the few observations which Dugdale has made on this subject in his *Origines Juridiciales*, nothing has been collected, either by our lawyers or antiquaries.

3. Glanville describes a fine to be an accommodation of a *placitum*, or suit actually commenced.— *Contingit autem multoties loquelas motas in curia domini regis per amicabilem compositionem et finalem concordiam terminari, sed ex consensu et licentia domini regis, vel ejus justiciariorum, undecunque fuerit placitum, sive de terra, sive de alia re.* It even appears, that so early as the reign of Henry III. there was a particular *placitum* adapted to the purpose of levying a fine. Thus Madox has transcribed a fine levied in 27 Hen. III., between Ranulph, abbot of Ramsey, and Mathew De Layham:—*Unde placitum finis facti summonitum fuit inter eos, in eadem curia.* Lib. 8. c. 1. Form. Angl. Dissert. § 17.

4. Madox seems however to have thought that a fine was not originally an accommodation of a suit, in the strict sense of the word; because in some of the most ancient fines extant, no original writ appears to have been sued out, nor any process used, for the purpose of bringing the parties before the court; but they themselves having accommodated the matters in dispute, and drawn up an agreement in writing called a *chirographum*, which signified a deed of two parts, written on the same sheet of paper or parchment; they then appeared in a court of justice, where they acknowledged it as their agreement, and mutually set their seals to it; and upon payment of a certain fine, it was enrolled among the records of the court, or else the parties entered into an agreement in court, where it was immediately reduced into the form of a Tit. 32. c. 1. § 24.

chirographum, and recorded, and a copy delivered to each of the parties.

Year Book, 21 Edw. 4. fo. 4. no. 8. fo. 60. no. 32.

5. This idea is confirmed by the opinion of the Judges in the Abbot of Merton's case, who said that a fine was nothing more than a covenant between the parties, recorded by the Justices; and if it were before Justices of record, the parties being present, it was sufficient, for the writ was sued out only to make the parties appear; and if they were present, and would appear *gratis*, it was unnecessary to sue out a writ, but they might make a final covenant by record; from whence it may be contended, that fines were at first exactly similar to the agreements which, in the time of the Anglo-Saxons, were entered into in the county courts. But a fine differs from those agreements in two very material circumstances; first, nothing appears to have been paid for permission to enter into such an agreement; and secondly, it was not enrolled in the records of the court. It may also be observed, that this mode of levying a fine, without an original writ, agrees exactly with the *transactio* of the civil law, which was not always an accommodation of a suit actually commenced; but an agreement relating to some doubtful matter, which must otherwise have become the subject of litigation. *Objectum sive materia transactionis sunt res dubiæ vel litigiosæ, de quibus scilicet vel nunc lis fit, vel in futurum esse possit, aut metuatur; nam litem motam esse, nihil necesse est.*

Vinn. Tract. de Transact. c. 4. n. 1.

6. The observation of the Judges in the Abbot of Merton's case may also be accounted for on another principle: an original writ was not absolutely necessary in Bracton's time to the commencement of a suit, for if the defendant would appear in court without a writ, the Judges might notwithstanding proceed in the

suit. *Tot erunt formula brevium quot sunt genera actionum, quia non potest quis sine brevi agere, cum non teneatur alius sine brevi respondere, nisi gratis voluerit, et ex hoc ei non injuriatur, cum scienti et volenti non fit injuria.* Bract. 413 b.

7. The law was however soon altered in this respect, for when *Fleta* wrote, an original writ was become absolutely necessary. Thus, in speaking of the Court of Common Pleas, that author says, *Habet etiam curiam suam et justiciarios suos residentes, qui omnes recordum habent in his quæ coram eis fuerint placitata, et qui potestatem habent de omnibus placitis et actionibus, realibus, et personalibus, et mixtis; dum tamen warrantum per breve regis habuerint cognoscendi, nam sine warranto, jurisdictionem non habent, neque cohertionem.* Lib. 2. c. 34.

8. The present manner of levying fines was settled by the statute *De modo levandi fines*, 18 Edw. I., by which it was enacted, that no fine should thenceforth be levied, unless upon a suit actually commenced, in the usual way; so that a fine then became an accommodation of a suit in the most strict and technical sense; and since the passing of that act, no material alteration has been made in the manner of levying fines. Present Manner.

9. It appears from Glanville, lib. 11. c. 1. that the suitors in the *curia regis* were at all times allowed to prosecute their causes by attorney, who was called *responsalis ad lucrandum vel perdendum;* and a plea might be thus commenced and determined, whether by judgement or by final concord, as effectually as by the principal himself. *Per procuratorem itaque talem potest placitum illud deduci in curia, et terminari, sive per judicium, sive finalem concordiam, adeo plenè et firmiter ut per eum qui alium loco suo inde posuit.*

10. In consequence of this doctrine, fines were frequently levied by attorney, and in the *Formulare Anglicanum* there are several records of fines, which appear to have been levied by attorney, the chirographer being worded in this manner:—*Hæc est finalis concordia facta, &c. inter Thomam De Preston, per Alexandrum Wallensem, positum loco suo ad lucrandum vel perdendum, et Ranulphum, &c.*

No. 362. 369.

Rot. Parl. vol. 1. 22. 2 Inst. 512.

This practice was productive of several frauds, and therefore the statute *De modo levandi fines* enacted, that the parties to a fine should appear personally in court, in order that the Judges might have an opportunity of examining into their age and capacity.

11. A fine now consists of five parts. 1. The original writ. 2. The *licentia concordandi*. 3. The concord. 4. The note. 5. The foot, chirograph, or indenture.

Original Writ.

12. When the parties have agreed to levy a fine, the person to whom the land is to be conveyed commences an action or suit at law against the vendor, by suing out a writ of covenant against him; the foundation of which is a supposed agreement or covenant, that the vendor shall convey the land to the purchaser; on the breach of which the action is brought; and as no suit can be commenced in any of the courts of common law without an original writ, and a fine being a friendly composition of a suit actually commenced, it follows that no fine can be levied without an original writ; and the statute *De modo levandi fines* expressly says, "that the order of the common law will not suffer a fine to be levied in the King's Court without an original." If however the Judges permit a fine to be levied without an original writ, it is not absolutely void, but only voidable.

Co. Read. 10. 2 Inst. 513.

13. A fine may be levied on every writ by which lands may be demanded, charged, or bound, or which in any sort concerns land; such as a writ of mesne, *warrantia chartæ, de consuetudinibus et servitiis*, &c. A fine may also be levied of an advowson, in a writ of right of advowson, of which Madox has given an instance of great antiquity. But a fine cannot be levied on an original in a personal action. 5 Rep. 39 a. Salk. 340. Holt, 322. Form. Angl. Diss. § 15.

14. The writ on which fines are now usually levied is a writ of covenant, which is in the realty, and lies where a man covenants to levy a fine to some other person, of his lands and tenements. The form of the writ is thus—*Præcipe A. quod teneat B. conventionem inter eos factam de manerio, &c. et nisi, &c.* And where the lands of which a fine is intended to be levied are situated in different counties, there must be a writ of covenant for each county. Booth Real Act. 247. Fitz. N. B. 146.

15. Fifteen days must be given between the *teste* and the return of a writ of covenant; and the *teste* must not be on a Sunday, or any day that is not *dies juridicus*.

16. In suing out a writ of covenant, there is a fine due to the King, called the *primer fine*; for in every real action for lands and tenements, above the yearly value of five marks, there is due a fine of 6*s*. 8*d*. for every five marks of the yearly value of the land, upon the original in the Hanaper office. 2 Inst. 511. Booth, 247.

17. Where the sheriff of the county in which the lands lie is a party to the fine, the writ ought to be directed to the coroner; for though the sheriff is in general the proper officer to execute all writs, yet where the writ is brought against himself, it is the practice, in order to prevent partiality, to direct the writ to the coroner, with this clause—*Quia prædictus A. B. est vicecomes comitatus D. fiat executio brevis* Done v. Leigh, Cro.Car. 416. W. Jones, 373.

prædict. per coronatorem; ita quod vicecomes non se intromittat.

Co. Read. 10. 1 Inst. 352 *b.*

18. If an original writ be countermanded by a *retraxit*, a fine cannot afterwards be levied on it.

Bro. Ab. tit. Fine, pl. 82.

Thus, in an assise, the plaintiff appeared and made a *retraxit;* afterwards the Judges recorded an agreement between the parties, in the nature of a fine; and, by the better opinion, it was void, *et coram non judice;* because when the agreement was made, there was no suit depending, the writ being determined by the *retraxit.*

19. Formerly, if the King had died after the purchase of the original writ, the parties could not proceed to levy a fine on it, because it was abated. But now it is otherwise; for by the statute 1 Ann. c. 8. § 5. no original writ, process, or proceedings whatsoever, shall abate by the death of any King or Queen.

20. As the parties are not supposed to appear before the return day of the writ of covenant, it follows that no agreement can take place between them until that period; and, therefore, if any of the parties die before the return day of the writ of covenant, the fine will be void.

Wright v. Wickham, Cro. Eliz. 468.

21. A writ of error was brought to reverse a fine levied by husband and wife; and the error assigned was, that the writ of covenant upon which the fine was levied bore *teste* the 10th of August, 12 Eliz., and was returnable in Michaelmas term of the same year, which was the 27th of October. The fine was acknowledged before commissioners, and the wife died on the 17th of October, which was before the return of the writ of covenant. The fine was reversed.

The same point was determined in the cases of Price v. Davies, Comb. 57—71; Clements v. Lang-

harne, 2 Lord Raym. 872; Watts v. Birkett, Barnes, 220; Wils. R. Part II. 115.

22. The second part of a fine is the *licentia concordandi;* for as soon as the action is brought, the defendant, knowing himself to be wrong, is supposed to make overtures of accommodation to the plaintiff, who accepts them; but having given pledges to prosecute his suit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up; which is readily granted, on payment of another ne. Licentia Concordandi, 5 Rep. 39 *a.*

23. This fine is called the King's silver, and is paid on obtaining the *licentia concordandi;* because the King, by such composition, loses the fine, amerciaments, and other advantages that would have accrued to him upon the judgement or nonsuit; which, in ancient times, formed no inconsiderable part of the royal revenue. King's Silver. 2 Inst. 511.

24. The King's silver, which is sometimes called the post fine, with respect to the primer fine, due on the original writ, is as much as the primer fine, and half as much more. It was entered on the writ of covenant in the following manner—*Robertus Drury dat dominæ Reginæ, sept. lib. pro licentia concordandi cum Thoma Tey arm. et Eleonora uxore ejus de placito conventionis de maneriis de, &c. &c. et habet chirographum per pacem admissum coram Jacobo Dyer, &c.* And such entry ought to contain, 1st, the sum given for licence to compound; 2d, the party who pays it, that is, the person in whom the fee is to be vested; 3d, the plea, and between whom; and, 4th, the land for which the fine is paid. Tey's Case, 5 Rep. 39 *a.*

25. If any of the parties die before the entry of the King's silver, the fine is in general void; because the

King's silver not being due until the return of the writ of covenant, and being paid for permission to accommodate the suit, the agreement of the parties cannot be considered as lawful until it is entered; consequently if the demandant or tenant dies before that is done, the fine will have no effect; being similar to a judgement given in an adversary suit, after the death of one of the litigating parties.

Farmer's Case, Hob. 330. Dyer, 220 *b.*

26. A man and his wife acknowledged a fine before commissioners, the 26th of March 1621, and the wife died on the 27th of the same month. The 28th, composition was made in the Alienation office upon a writ of covenant, made returnable in Hilary term before, and the King's silver was entered in the office of the King's silver as of the same Hilary term, and so the fine was passed and engrossed. The heir at law of the wife moved in the Easter term following against this fine; but upon debate the Court resolved that the fine must stand.

Anon. 2 Vent. 47.

27. A fine was acknowledged by a man and his wife on the 27th of December 1689, but by reason of King James's abdication, and his carrying away the great seal, there followed a stay of proceedings at law, and the woman died on the 22d of February. The King's silver was paid as upon a writ of covenant in King James's time, though no writ was then sued out. Afterwards a writ of covenant was purchased, returnable in Michaelmas term preceding, sealed with the seal of King William and Queen Mary, and the fine was engrossed as of Michaelmas term. It was moved that this fine should be vacated; but the Court, after the cause had been twice argued, gave their opinion *seriatim* that the fine should stand, as the entering of the King's silver after the death of

the parties could not then be examined into, the fine being engrossed and completed as a fine of Michaelmas term. Ball v. Cock, 3 Mod. 140.

28. A fine was acknowledged before commissioners on the 13th of May 1754. The writ of covenant was tested the first day of Easter term in five weeks (19th May). It was compounded, and the pre-fine paid between the 17th and 20th of May, and after passing the return, warrant of attorney, and *custos brevium* office, was brought to the King's silver office on the 11th of June, and the clerk then entered the King's silver or post-fine in his book, and on the writ of covenant. Mary Nunn the cognizor died on the 27th of May. A caveat to prevent the completing of this fine was brought to the King's silver office the 13th of June, before the record was made up in form, on behalf of John Nunn, eldest son and heir of the cognizor. A rule to show cause why that caveat should not be withdrawn, was made absolute, and the Court utterly exploded the notion which prevailed, undoubtedly by mistake, in the case of Harneis v. Mickletwaite, that the King's silver was the pre-fine, or fine for licence to alienate, whereas the King's silver is the post-fine, or fine given *pro licentia concordandi*. The return of the writ of covenant was agreed to have been in the lifetime of Mary Nunn, the cognizor; and from that time the Crown had a right to the post-fine, which was entered at the King's silver office before any caveat was entered against it. The making up the record in form is a ministerial act, not necessary to be done previous to the caveat, as the entry of the clerk of the King's silver was sufficient. Barber v. Nunn, Barnes, 218. Barnes, 214.

29. When a year and a day has elapsed from the date of the caption, or acknowledgement of a fine, Cotton v. Tyrrell, Barnes, 215.

without entering the King's silver, an affidavit must be made that all those who depart with any interest by the fine are still living, otherwise the King's silver will not be received. And if a year elapses before a fine is carried to the King's silver office, an affidavit must be made that the parties were alive when the King's silver was paid.

Gregory v. Croucher, Barnes, 215.

30. By a rule of the Court of Common Pleas, made in Easter term, 9 Anne, it is ordered, "That no fine whatsoever, taken and acknowledged before the Chief Justice, or any judge of assize, or serjeant at law, if the date of the caption of such fine shall appear to have been rased, shall for the future pass the Queen's silver office, and the Queen's silver of such fine be recorded, by the said clerk of the Queen's silver, before there be an order under the hand of the said Chief Justice, or some other justice of this court, for his passing and entering such fine, first had and obtained."

31. Formerly the post-fine or King's silver was paid at the King's silver office; but by the statute 32 Geo. II. c. 14. it is enacted, § 1. "That on every writ of covenant which shall be sued out for passing of fines in the Common Pleas at Westminster, the officer whose duty it is to set and indorse the pre-fine payable thereon, shall, at the same time, set the usual post-fine, and indorse the same on the back of the said writ, together with his name or mark of office, in like manner as the same are now indorsed at the King's silver office; which post-fine shall be forthwith paid to the receiver of the pre-fines at the Alienation Office, with 4*d.* as his fee for receiving the same, instead of his fee of 4*d.* charged on lands and hereditaments, and payable to sheriffs, bailiffs, and others, on discharging the

same, by 3 Geo. I. c. 15; which fee of 4*d.* by the said act granted, after the first day of Trinity term 1759, shall cease; and such receiver shall indorse upon the back of every such writ of covenant one mark of office, as is now used by him on the receipt of pre-fines at the Alienation office, with the name of such receiver, and the sum received as the post-fine; which mark of such receiver shall discharge the manors, lands, and hereditaments comprised in the said writ of covenant, and the cognizees named therein."

Sect. 2. "The officer or clerk of the King's silver office, or his deputy, shall continue to enter every fine upon record, in the way hitherto used, and make the same entries, and put thereon the same indorsements, with the same mark, and in like manner, as hath hitherto been the practice of the said office in passing fines; and no fine, until the same be marked with the sum to which the post-fine amounts in the King's silver office, shall be effectual in law."

Sect. 3. "Where no pre-fine is payable on any writ of covenant, viz. where the lands are under the yearly value of five marks, the officer at the Alienation office, whose duty it is to set pre-fines, shall set on every writ of covenant brought to the said Alienation office, on which no pre-fine is payable, a post-fine of 6*s.* 8*d.*, and shall indorse such post-fine of 6*s.* 8*d.* on every such writ of covenant, with his name and mark of office, as it has been usual; and every such post-fine of 6*s.* 8*d.* shall be paid to the receiver of the Alienation office before the writ of covenant, on which no pre-fine is payable, be passed at the Alienation office; and the receiver, on payment of the said 6*s.* 8*d.* shall indorse and mark every such

writ of covenant, as other writs of covenant are by this act directed to be indorsed."

Sect. 4. "The officer or clerk of the King's silver office, or his deputy, after the first day of Trinity term 1759, shall not receive any writ of covenant; unless it appear, by the mark and indorsement of such receiver, that the post-fine has been paid."

Sect. 5. "If after the payment of such post-fine, the writ of covenant, by the death of any of the parties, or other cause, be prevented from passing through the several other offices, so as the said fine is not completed, then the said receiver shall repay to the cognizees, or their attorney, on producing and filing with him the said writ of covenant, every such sum as has been by him before received for the post-fine; and such writ of covenant so remaining filed with such receiver, shall be a discharge to such receiver."

1 Bos. & Pull. 530.

32. By a rule of the Court of Common Pleas, made in Easter term, 36 Geo. III., it is ordered, that no fines which shall appear to have been acknowledged more than twelve calendar months, shall be permitted to pass the King's silver office, without a rule of Court, or an order under the hand of the Lord Chief Justice, or some other Judge of that Court. And that where the conuzor or conuzors shall be all living at the time of making the application for such rule or order, an affidavit shall be made thereof. And in case any or either of the conuzors of such fine should not then be living, an affidavit shall be made, stating the time of the death of such conuzor or conuzors; and the application in such case for a rule or order, that the said fine may pass the King's silver office, shall be made to the Court by motion, if in term

time, or if in vacation, to the Lord Ch. Justice or some other of the justices of that Court, at his chambers. And that the rule or order in such last-mentioned case, when obtained, shall be filed, with the *præcipe* and concord of the fine, at the King's silver office.

33. The third part of a fine is the concord or agreement entered into openly in the Court of Common Pleas, or before the Chief Justice of that Court, or commissioners duly authorized for that purpose; which is the substance of the fine. It is usually an acknowledgement from the deforciants, or those who wlm keep the others out of possession, that the lands in question are the right of the demandant; and from the acknowledgement or recognition of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. Concord. 5 Rep. 39 *a*.

34. The form of the concord is thus:—"And the agreement is such, to wit, that the aforesaid A. (the deforciant in the original writ) hath acknowledged the aforesaid manors, lands, tenements, and hereditaments, with the appurtenances, to be the right of him the said B. (the plaintiff or demandant) and those he hath remised and quit-claimed from him the said A. and his heirs, to the aforesaid B. and his heirs, for ever. And moreover the said A. hath granted, for himself and his heirs, that he will warrant to the aforesaid B. and his heirs, the aforesaid manor, lands, tenements, and hereditaments, with the appurtenances, against him the said A. and his heirs for ever."

35. By the common law, the cognizor seems to have been bound to warrant the lands to the cognizee, though no express words to that purpose were inserted in the fine. Thus Bracton says,—

382 *a.* 389 *a.* *Item sufficit finis factus in curia domini regis, licet expressa warrantia vel homagium et servitium non intervenerit; dum tamen constiterit per finem et chirographum, quod ille qui tenet, tenere debeat de eo qui vocatur ad warrantiam.* But in course of time it became the practice to annex an express warranty to all fines which is still continued.

Farmer's Case, Hob. 330. 36. It was formerly the practice for the cognizor to make the cognizance, that is, to acknowledge the concord of the fine, before any original writ had been sued out; and this custom so far prevailed, that the Judges uniformly supported such fines; but in all cases of this kind, an original writ must have been sued out and made returnable on some day previous to that on which the concord was acknowledged: a *licentia concordandi* must also have been obtained, and the King's silver regularly paid and entered; for these circumstances were absolutely necessary to complete the fine.

37. The practice of acknowleging the concord of a fine before the writ of covenant was sued out, was often productive of great inconveniences and irregularities; which are now prevented by a rule of the Court of Common Pleas, made in Trinity term 30 Geo. III., by which it is ordered, that from and after the first day of Michaelmas term then next ensuing, every fine, at the time of signing the Judge's *allocatur* thereon, shall have the writ of covenant sued out, and annexed thereto.

1 H. Black. Rep. 526.

38. The *concordia facta in curia* is the complete fine; and therefore if after the concord is acknowledged in Court, one of the cognizors dies, still the cognizee may proceed with this fine, against the surviving cognizor.

39. Two brothers acknowledged the concord of a fine before Lord Ch. Just. Hobart, and then the elder brother died; several motions were made for the proceeding, and staying of the fine. The Ch. Just. was clearly of opinion that the cognizee might proceed with his fine as against the surviving brother, and take out his writ of covenant accordingly, the death of his elder brother being no impediment; for the acknowledgement of each person was good against himself, and should operate for as much as he could pass. Ersfield's Case, Hob. 329.

40. A fine was stopped at the King's silver office, for want of an affidavit that the parties were living, a year having elapsed since the acknowledgement; and one of the cognizors being dead, application was made to the court that he might be struck out, and that the fine might pass as to the other cognizor. This motion was denied, but a rule was made that the surviving cognizor should show cause why the fine should not pass generally as to all the parties; and upon affidavit of service, the rule was made absolute. Cotton v. Baylie, Barnes, 215.

41. The concord comes in lieu of the sentence which would have been given in case the parties had not compounded the cause; and is therefore considered as exactly similar, and attended with the same consequences, as a judgment in an adversary suit. The cognizance must therefore be made of those things only, and to those persons only, who are named in the original writ, on which the fine is levied; because the cognizance being in the nature of a judgement, binds only those persons and things which are judicially before the Court. Similar to a Judgement. Co. Read. 6.

42. This rule, however, admits of a few exceptions; for a remainder may be limited in the concord of a Idem,

fine, to a person not named in the original writ; in the same manner as a remainder may be limited, in a deed, to a person who is not a party.

Tit. 32 c. 2. § 3.

Co. Read. 11.

43. If a *præcipe* be brought against a tenant for life, and upon his default the person in reversion is received, he may levy a fine of his reversion to the demandant; although he is not named in the original writ. In the same manner, if a fine is levied by a vouchee to the demandant, or by a demandant to the vouchee, it will be good: but a fine levied by a vouchee to a stranger is void.

5 Rep. 39 *b.*

44. The reason of the two last cases is because the person in reversion, and the vouchee, are allowed by the court to come in the place of the tenant, against whom the *præcipe* was originally brought; and having been made parties to the suit, they are bound by the judgement, as much as if they had been named in the original writ.

Bro. Ab. Tit. Fine, 7. Co. Read. 8. 5 Rep. 38 *b.*

45. The object of fines being to settle the possession, not only for the present, but for ever, in the most certain and secure manner, the Judges never allow lands to be limited in the concord of a fine to two persons and their heirs, but always direct them to be limited to the two persons, and to the heirs of one of them.

Seymour v. Parker, infra, c. 3.

Rob. Gav. 132.

46. The necessity of the case however requires that where the lands comprehended in a fine are held in gavelkind, this rule should be dispensed with; and therefore when a fine is levied of lands of this sort, the Judges will permit them to be limited to two or more persons, and their heirs.

Co. Read. 3.

47. A warranty ought not to be allowed in the concord of a fine from two persons and their heirs, for the same reason. But a warranty has been allowed from three persons and their heirs, where the lands were held in gavelkind.

Rob. Gav. 132.

48. The Judges ought not to permit a fine to be levied upon condition; nor should a saving or exception, or a clause of re-entry, be allowed in a fine: but if a fine is actually levied to two persons and their heirs, or with a warranty from two persons and their heirs, or upon condition, with a saving, exception, or clause of re-entry; such a fine will notwithstanding be valid, upon the principle that *fieri non debuit, sed factum valet, et facta tenent multa quæ fieri prohibentur.* And Plowden has given some instances of fines levied on condition, which were allowed to be good. 2 Rep. 74 *b.* 5 —— 38 *b.* 12 Rep. 125. 34.

49. Lands situated in different counties may be contained in the same concord, though there must be several writs of covenant. Dyer, 227. 2 Inst. 512 *a.* ante.

50. Formerly lands purchased of different persons were allowed to be comprised in the same concord; and every vendor warranted against himself and his heirs only: but by an order of Lord Chancellor Hatton, reciting that by fines of this sort her Majesty was defrauded of the profits of her post-fines, and of the seals on writs, and the Chancellor and others lost their fees; the cursitors are authorized to stay a writ where there is more than one demandant, and one deforciant, except coparceners, joint tenants, and tenants in common. But the cursitors will permit two separate purchases to be comprised in one fine, on an affidavit that the value of both together does not exceed two hundred pounds. Wils. on Fines, 47.

51. The fourth part of a fine is the note, which is an abstract of the writ of covenant and concord, and is only a docquet taken by the chirographer, from which he draws up the indenture. It is sometimes taken in the old books for the concord. Note. 5 Rep. 39 *a.*

52. The fifth and last part of a fine is the foot, chirograph, or indenture, which includes the whole Foot or Chirograph.

matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made and engrossed at the chirographer's office, and delivered to the cognizor and cognizee; beginning with these words, "This is the final agreement, &c." and then stating the whole proceeding at length. Thus the fine is completely levied at common law.

Co. Read. 1.

53. A fine is said to be engrossed when the chirographer makes out the indentures, and delivers them to the parties. But it is not absolutely necessary that a fine should be engrossed, provided the concord be recorded; for Lord Coke observes, that a fine is a perfect record before it is engrossed. And a fine may be engrossed at any time after it is levied.

Brome's Case, 4 Leon. 96. Crompton's Case, Dyer, 254 *a.*

54. Sir John Brome in 33 Hen. VIII. acknowledged a fine of certain lands. The King's silver was entered, and the cognizance taken; and in 29 Eliz. the person who claimed under this fine came into court, and prayed that the fine might be engrossed, it appearing upon examination that the party to whom the fine was levied was seised after the fine, and had suffered a common recovery of the land, which had been enjoyed according to the said fine. The Court ordered the fine to be engrossed.

3 Leon. 183. Godb. 103.

55. The record of the fine which remains in the possession of the chirographer is the *principale recordum;* so that if there is any difference between it and the record which remains with the *custos brevium,* that which continues with the chirographer is considered as the true record.

Bull. N. P. 229.

56. The chirograph of a fine is evidence to all persons, and in all courts, of such fine; because the chirographer being an officer appointed by the law

for the purpose of transcribing fines from the record, his copies must be allowed to be authentic.

57. By the stat. 23 Eliz. c. 3. § 6. it is enacted, that the chirographer shall every term write out a table of the fines levied in each county in that term, and shall affix it in some open part of the Court of Common Pleas, all the next term; and shall also deliver the contents of each table to the sheriff of each county, who shall, at the next assixes, fix the same in some open part of the court.

All the Proceedings on Fines must be recorded, Rot. Parl. vol. 3. 495. 543. 557. 558.

58. There are two petitions of the Commons in the Rolls of Parliament, 4 Hen. IV. No. 35. and 5 Hen. IV. No. 28., stating, that many fines of land remained in the King's treasury, and the notes of such fines remaining in the Court of Common Pleas had been taken away, and other fines and notes of fines counterfeited and put in their places, whereby many persons were disinherited; in consequence of which, a statute was immediately passed, 5 Hen. IV. c. 14., enacting, that all the proceedings on fines, both previous to and at the acknowledgement thereof, should be enrolled of record in the Court of Common Pleas. And by the 23 Eliz. c. 3. § 1 & 6. it is enacted, that every writ of covenant and other writ, whereupon any fine shall be levied, the return thereof, the writ of *dedimus potestatem* made for the knowledging of any of the same fines, the return thereof, the concord, note, and foot of every such fine, the proclamations made thereupon, and the King's silver, may, upon the request or election of any person, be enrolled in rolls of parchment; and that the enrolments of the same, or of any part thereof, shall be of as good force and validity in law, to all intents, respects, and purposes, for so much of any of them so enrolled, as the same, being extant and remaining, were or ought by law to be.

59. The office of the chirographer of fines was burnt down in the year 1679, whereby several records of fines which had been levied in Trinity and Michaelmas term preceding, were either burnt or lost. In consequence of which an act was passed, 31 Car. II. c. 3. reciting, that the fines so burnt or lost had duly passed all the offices; so that by the records of the King's silver, the notes of the cursitor who made out the writs of covenant, and the entries thereof at the office of alienation, and by the book of entries of fines kept by the chirographer's deputy, &c. the full contents of all such fines would appear. But for want of the records of the fines so burnt or lost, purchasers and others, whose titles were secured under the said fines, were in danger of having the same impeached. It was therefore enacted, that the said chirographer or his deputy should, before the end of the next Trinity term, upon oath certify to the Justices of the Common Pleas, a note of all such fines entered into the said book kept by the said deputy, that he, upon diligent search, should find, were either burnt or lost, by reason of the said fire; which certificate should be in parchment, fairly written, and a copy thereof set up in Westminster Hall, &c.; and that any time within three years, the Chief Justice of the said Court of Common Pleas, together with any one or more of the Justices of the said Court, should have power to send for any officer's books, records, &c. and upon full examination of any such fine, the records whereof were burnt or lost, should direct the said chirographer or his deputy to new engross the note and foot of such fine without fee, and to carry the same before the said Chief Justice, and such other of the said Justices as shall have taken the examination concerning the burning or loss of such fine, who are required

to subscribe their names at the bottom of the said note and foot; and every such fine whereof the record should be so new engrossed, should be of the same force and effect, as if it had still remained upon record unconsumed or not lost.

No Averment against the Record of a Fine. Dyer, 89 *b.* 2 Inst. 260 *a.*

60. It is a principle of the common law, that the evidence of a record is of so high and certain a nature, that its authenticity is never permitted to be called in question; so that no averment can be made against any fact which appears on record. Thus if it appears upon record, that the King's silver was paid before the death of the cognizor, though in truth the fact be otherwise, the Judges will support the fine, and will not allow of any averment that the cognizor died before the entry of the King's silver, because that would contradict the record.

61. So when the *chirographum* of a fine is recorded, no averment will be allowed as to the time of its caption or acknowledgement; but it will be considered as a fine of that term in which it is recorded.

Lloyd v. Vis. Say and Sele, 1 Brown 379, Salk. 341. 10 Mod. 40. 4 Bro. Parl. Ca. 73.

62. Upon a trial at bar, in ejectment, it appeared, that Nathaniel Lord Viscount Say and Sele, being tenant in tail of the premises in question, with remainder over, levied a fine in October 1701, and, in Michaelmas term following, suffered a recovery; and to prove this, the chirograph of a fine was produced, importing, that Nathaniel Viscount Say and Sele levied that fine on the 23d of October 1701; and the exemplification of a common recovery was also produced, which appeared to have been suffered on the 18th of November 1701. The question was, whether the cognizee of the fine had the freehold in him when the recovery was suffered?

It was insisted by the plaintiff's counsel that he had not; for that the fine, given in evidence to make him

so, was not in fact acknowledged until the 2d of March 1701, which was four months after the recovery was suffered; and, to support this fact, they offered to produce and prove, 1st, The record of the recognizance, or acknowledgement of the fine, under the hand of the Lord Chief Justice Trevor, whereby it appeared, that the acknowledgement thereof was made and taken before the said Lord Chief Justice on the 2d day of March 1701, and not before. 2dly, That the acknowledgement of the fine was the very true acknowledgement or recognizance of the concord upon which the fine given in evidence passed, and upon which the chirographer of that fine was made and engrossed. And, 3dly, They offered to produce the files of the Court of Common Pleas of the acknowledgement of all fines in Michaelmas term 1701, whereby it would appear that Lord Say and Sele did not acknowledge any fine whatsoever, of or in that term, at any time before the suffering the common recovery. But the Court of Queen's Bench refused to admit any of the matters offered against the fine to be given in evidence, being of opinion, that no proof or evidence of the time of the acknowledgement of a fine ought to be admitted, contrary to, or against the chirograph thereof; and that the record, which is the chirograph of the fine, cannot be falsified until it is vacated or reversed.

From this judgement, a writ of error was brought in the House of Lords; and one of the errors assigned was, because the records and matters offered to be given in evidence, were not admitted or allowed by the Court to be given in evidence to prove the true time of acknowledging the fine. In support of which, it was insisted, that as the fine was not in fact acknowledged until the 2d of March, it could not transfer

the freehold of the lands to the tenant to the *præcipe* three months before the time of that acknowledgement; and that the plaintiff was admitted to the proof of this fact by the statute 23 Eliz. c. 3. § 5., which directs, that the time of the acknowledgement shall be certified by those who take such acknowledgement; for, if a man cannot give in evidence the time of acknowledging a fine, in order to avoid deceit imposed upon him by that fine, this statute would answer no purpose.

On the other side it was contended, that the caption of the fine ought not to be admitted against the record or indenture of the fine; for it would shake all family settlements, and introduce the greatest uncertainty and confusion in all conveyances by fines, upon which the most considerable estates in the kingdom depended; and that an attempt to set aside a fine upon evidence was never before made. That, in the indentures of all fines, the concord is recorded to be made in court; whereas the captions of the acknowledgements of all fines (except a very few) are taken out of court, either before the Lord Chief Justice of the Common Pleas, or commissioners in the country; and upon a writ of error, no error can be assigned in the caption varying from the record, as that would be an error contrary to the record: but if, in the present case, the fine was irregular, the proper method was to apply to the Court of Common Pleas where the same was levied, and not attempt, in a summary way, to invalidate it by evidence in ejectment. The judgement was affirmed.

Vide infra, ch. 14.

63. In the case of an *ambiguitas latens*, an averment is however admitted to explain, not to contradict a fine, upon the same principle as in the case of a deed. Thus if A. levies a fine to William his son,

Exception.

Tit. 32. c. 19.

8 Rep. 155 *a*.

5 Rep. 68 *b*.

to have and to hold to him and his heirs; upon this fine the Judge cannot make question upon any matter of law, but the party comes and avers matter in fact, and saith that A. had two sons named William, an elder and a younger, and his intent was to levy the fine to William the younger. This averment out of the fine is good, of this matter of fact, which well stands with the words of the fine, and shall be tried by the country.

Motions to prevent Fines from being completed.

64. Applications are sometimes made to the Court of Common Pleas, by motion, to prevent fines from being completed; on a suggestion that the parties are disabled by law from levying such fines.

Wilson, 96.

65. By a rule of court, made Hil. 28 & 29 Car. II., all persons making any complaint against fines acknowledged by infants, feme coverts without the consent of their husbands, or persons of *non sane memorie*, or otherwise disabled by law to acknowledge the same, or by any person in the name of another, or by the like deceit, and obtaining rules for the staying of such fines, shall, from term to term, so long as they shall expect benefit or observance of such rules, enter and continue the same rule for that term, or leave copies thereof with the *custos brevium*, clerk of the King's silver, and chirographer, that the same may thereby be the better taken notice of; or, in default thereof, the said officers, or any of them, shall not stand farther obliged thereby.

And all persons concerned in the obtaining or prosecuting such rules for the staying of such fines so levied as aforesaid, their attornies and clerks, are thereby enjoined, every term, to search and see the books and entries of fines with the clerk of the King's silver, or other officer, where entries are kept for that purpose.

66. By a rule of court, made Pasch. 29 Car. II., all manner of caveats and orders for the stopping any fines shall be renewed every term, and copies thereof left with the clerk of the King's silver, for which he is to demand only his ancient fee of 3*s.* 4*d.* the term; and in default thereof, all caveats that shall not be so renewed, shall lose their force and be void.

Felony to acknowledge a Fine in the Name of another.

67. It appears to have been formerly not unusual for one person to acknowledge a fine in the name of another; and in those cases, the Court of Star Chamber, within whose jurisdiction frauds of this kind were considered, could only punish the offender by imprisonment. But by the statute 21 Ja. I. c. 26. it is enacted, that all and every person and persons who shall acknowledge any fine, in the name of any other person, not privy or consenting to the same, and shall be lawfully convicted thereof, shall suffer death, without benefit of clergy.

Hubert's Case, infra, c. 14.

When a Fine is completed.

68. With respect to the time when a fine is completed, Lord Coke, in his comment on the statute *De modo levandi fines*, says—"A fine is said to be levied when the writ of covenant is returned, and the concord and the King's silver duly entered: this maketh the land to pass, and from this shall the year and day be accounted, albeit the fine be engrossed afterwards."

2 Inst. 517.

69. When the mode of levying a fine by first acknowledging the concord, then suing out an original writ, and paying the King's silver, was allowed, a different manner of expressing the rule laid down by Lord Coke was adopted; for the fine was said to be completed upon the entry of the King's silver, provided it was previously acknowledged; and if any of the cognizors died before the remaining parts of the fine were perfected, still the fine would be valid.

Petty's Case, 1 Freem. 78.

70. A motion was made to stay the passing of a fine, which was acknowledged by an infant of 13 years old. The Court said, that as the King's silver was paid, it was gone too far; but they assigned the infant a guardian, who had instructions to bring a writ of error to reverse it.

71. In consequence of the rule of court already stated, by which it is required that the writ of covenant shall be sued out before the concord is acknowledged, it may now be laid down, that a fine is completed when the concord is duly acknowledged.

When it begins to operate.

72. Although it must be very material, in many cases, to ascertain the precise time when a fine begins to operate, yet it is a subject respecting which very little is to be found in the books; but if we reason by analogy from the nature and effect of other judgements, we shall be able to ascertain this point.

Lloyd v. Say & Sele, ante, § 62.

The time when a fine is acknowledged is perfectly immaterial; for we have already stated a case, in which it was determined, that a fine began to operate in Michaelmas term, although it was not acknowledged until four months after.

Cro. Car. 102. Vide Tit. 14. § 22.

73. The whole term is considered to many purposes as but one day; and if a judgement be given at any time during the term, it relates to the first day of that term, and is considered in law as having been given on that day. And the first day of term is the essoign day, for the *quarto die post* is only a day of grace. But if a writ be returnable on the second, or any other return day of the term, the judgement will then relate to that return day; for till the return of the writ, the judgement cannot possibly be given.

74. Now, a fine being considered as a judgement, must, like all other judgements, relate to the first

day of the term in which it is recorded, if the writ of covenant whereon it is levied be returnable the first day of term; otherwise it must relate to the return day of the writ of covenant. For in levying a fine, there is no continuance of process to retard the relation, as the *licentia concordandi* is supposed to be obtained on the return of the writ of covenant, and the concord immediately acknowledged.

75. In support of this proposition I shall transcribe a case reported by Jenkins, of which, I presume, the authority will not be disputed, though the reporter has not mentioned when, and by what court, it was determined.

"A. covenants with B. to levy a fine, Oct. Michaelis 1 Car. A. acknowledges a statute to C. 8th October same year. The fine is levied according to the covenant, and the conusance taken the 12th October aforesaid. This conusee shall avoid the said statute by relation to the day of the essoin; which was before the said 8th day of October." Jenk. 250.

76. In a note of Peere Williams, it is said, that if A. devises land, and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ of covenant, and not from the caption. And yet (says the reporter) this is a hard case; since, by the caption, the party conusor does all his part, and the rest is only the act of the clerk, or his attorney, without any particular instructions from the party. Vol. 3. 170.

77. These passages, and the conclusions drawn from the rules by which all other judgements are construed, seem fully to prove that a fine, whether acknowledged before or after the original writ on 2 Burr. 711.

which it is levied is sued out, will begin to operate from the return day of such original writ.

Of the Proclamations.

78. When fines were adopted as a general mode of assurance, it became necessary to render the levying of them a matter of the most public notoriety, on account of those whose rights might be barred by not making their claim in due time. For this purpose it was enacted by the stat. 27 Edw. I. c. 1. that the notes of all fines should, in future, be openly read in the Court of Common Pleas, at two certain days in one week; and that, during such reading, all pleas should cease.

79. By the statute 4 Hen. VII. c. 24. § 1. it is enacted, "That after engrossing of every fine, it shall be read and proclaimed in open court the same term, and in three terms then next following the same engrossing, in the same court, at four several days in each term; and in the same time that it is so read, all pleas to cease."

Dyer, 234 *a*.

Since the making of this act, the proclamations are indorsed on the foot of the fine, and are considered as matters of record.

Plowd. 371.

80. By the words of the statute 4 Hen. VII. if one of the three terms immediately subsequent to that in which a fine was levied was adjourned, the proclamations would have been ineffectual, and this defect could not have been supplied in the next term. To remedy which, a statute was made, 1 Mary, c. 7. § 2. enacting, "That all fines whereupon the proclamations should not, by reason of the adjournment of any term by writ, be duly made, should be of as good force, effect, and strength, to all intents and purposes, as if the term had not been adjourned." And it has been determined by all the Judges, that even an adjournment of part of a term was provided for by this

Dyer, 186 *a*.
2 Inst. 519.

act; because it was a favourable law, and to be construed by equity.

81. By the statute 31 Eliz. c. 2. it is enacted, that all fines shall be proclaimed only four times; that is to say, once in the term wherein they are engrossed, and once in every of the three terms holden next after the same engrossing: and that every fine proclaimed as aforesaid, shall be of as great force and effect in law, to all intents and purposes, as if the same had been 16 times proclaimed.

82. The statute 4 Hen. VII. directs that the proclamations shall be made, not only during term, but also in court, at the time when the Judges are sitting; so that if the proclamations appear to have been made out of term, or on a Sunday, or other festival, on which the Court of Common Pleas does not sit, the proclamations will be all void. And although the proclamations should be made on days which were *dies juridici*, yet if the contrary appear on record, the proclamations will be void; as no averment can be admitted against the record. Fish v. Brocket, Plowd. 265. Dyer, 181 *b.*

83. If the proclamations on a fine be certified in a *certiorari* by the *custos brevium*, and it appear by the certificate that two of the proclamations were made in one day, a new *certiorari* may be directed to the chirographer; and if he certifies that the proclamations were well and duly made, the Court will direct the proclamations in the office of the *custos brevium* to be amended, according to the proclamations in the chirographer's office; because the chirographer makes the proclamations, and is the principal officer as to them; and the *custos brevium* has only an abstract of them. Ragg v. Bowley, 3 Leon. 106.

84. An error in the proclamations would not destroy the validity of a fine, for it would still enure Dyer, 216 *a.* 1 Bulst. 206.

as a fine at common law; because the fine taken separately is one perfect matter of record, before the proclamations are made, which binds the parties and the land; and the proclamations are distinct and different from the fine, they and the fine being several matters of record: for which reason error in the one is not error in the other. But if the fine is erroneous, the proclamations are then void, because the fine is the principal.

Bull. N. P. 229.

85. When a fine with proclamations is given in evidence, the proclamations must be examined by the roll, because the chirographer is not appointed by the statute to copy the proclamations, as he is to copy the foot of the fine.

Wakefield v. Hodgson, Cro. Eliz. 692.

86. Since the statute 4 Hen. VII. fines have been distinguished into fines at common law, and fines with proclamations. It is in the election of every person who levies a fine to have it proclaimed in the usual manner; and if the cognizee dies before the

Dyer, 254 *a.*

proclamations are made, his heirs may cause the fine to be proclaimed.

TITLE XXXV.

FINE.

CHAP. III.

Of the several Sorts of Fines.

1. *Fines executed and Executory.*
10. *Fine sur Cognizance de Droit come ceo, &c.*
16. *Sur Cognisance de Droit tantum.*
21. *Sur concessit.*
25. *Sur Done, Grant, and Render.*

SECTION 1.

Fines executed and executory.

WHENEVER a judgement is obtained, whether in an adversary or an amicable suit, the next step is to procure the execution of it, by obtaining the actual possession of the thing recovered; and for this purpose the law has provided, that in all real actions, the person who recovers shall have a writ of *habere facias seisinam*, directed to the sheriff of the county in which the lands are situated, commanding him to deliver the possession, according to the judgement,

2. Fines having at all times been considered as judgements, a writ of *habere facias seisinam* always c. issued to put the party who acquired the lands by a fine, into possession of them. When fines became common assurances, the purchaser, in order to avoid the trouble and expence of suing out a writ of possession, had in many instances livery of seisin given him in the country, and for his further assurance obliged the vendor to covenant that he would levy a fine to him; but as the purchaser was

already in possession, no writ of *habere*, &c. was necessary.

Co. Read. 2. 3. This practice gave rise to the distinction between fines executed, and fines executory. A fine executed immediately transferred the possession from the cognizor to the cognizee, who might therefore enter on the lands which had been conveyed to him by the fine, as soon as it was levied.

A fine executory did not, of its own force, give actual possession in law to the cognizee, as he could not immediately enter on the lands; but it was necessary that he should sue out a writ of *habere facias seisinam*, in order to gain possession of that which he had acquired by the fine.

1 Inst. 320 *a*. 4. The cognizee of a fine could not distrain before attornment, because an avowry came in lieu of an action, to which privity was necessary: for the same reason he could not have an action of waste, a writ of entry *ad communem legem*, *in consimili casu*, or *in casu provisc.* But the cognizee might take Gilb Ten. 102. those things which the lord could seise, or enter upon, without bringing any action; as a heriot, or lands fallen by escheat, or might enter for an alienation of a tenant for life.

2 Inst. 469. 5. Where the cognizee of a fine executory, suffered a year and a day to elapse from the time when the fine was levied, without suing out a writ of *habere facias seisinam*, he must then have sued out a writ of *scire facias*, which might also be sued out by his heir.

6. By this latter writ the sheriff was commanded to warn the terre-tenants to appear and show cause, if they could, why the cognizee of the fine, or his heirs, should not have execution of the fine. And if at the return of the *scire facias* the terre-tenants

did not show some cause to the contrary, the plaintiff or cognizee became entitled of course to a writ of *habere, &c.*

7. If the party to whom the estate was limited by a fine executory, was in possession at the time when such a fine was levied, he need not have sued out a writ of *habere facias seisinam*, for in that case the fine would enure by way of extinguishment. Touch. 4.

8. If a fine executory is levied of a reversion, depending on an estate for life or years, or of a seigniory, or any thing which lies in grant, they will pass immediately; because it would be impossible to give actual possession of them. 1 Rep. 97 *a.*

9. Since the statute of uses, 27 Hen. VIII., writs of possession are never sued out where fines are levied to uses: for the statute executing the possession to the use, the cognizee is immediately in possession without attornment. And by the 4th and 5th Ann. c. 16. attornment after a fine is become unnecessary; so that writs of possession are now totally disused. Booth, 250. Pigot, 49. 6 Rep. 68 *a.* Tit. 11. c. 3.

10. Fines are again divided into four sorts; the first of which is called a fine *sur cognizance de droit come ceo qu'il a de son done*; this is the best and surest kind of fine, for the deforciant, in order to keep his supposed covenant with the plaintiff, of conveying him the lands in question, and at the same time to avoid the formality of an actual feoffment with livery of seisin, acknowledges in court a former feoffment or gift in possession to have been made by him to the plaintiff; so that it is rather an acknowledgement of a former conveyance than a conveyance originally made; for the deforciant acknowledges, *cognoscit*, the right to be in the plaintiff or cognizee Fine sur cognizance de Droit come ceo, &c. 2 Comm. 352

as that which he had *de son done*, of the proper gift of himself, the cognizor.

1 Inst. 50 *b.* 1 Salk. 339. 3 Atk. 141. 11. This species of fine has been called a feoffment of record, but this expression is by no means correct; for there are cases in which a feoffment has a more extensive operation than a fine; and therefore Sir William Blackstone has justly observed, that it might with more accuracy be called an acknowledgement of a feoffment upon record.

Tit. 32. c. 4.

12. The form of this fine is—"And the agreement is such, to wit, that the aforesaid A. hath acknowledged the aforesaid manor, &c. to be the right of him the said B., as that which the said B. hath of the gift of the aforesaid A.; and that he hath remised and quitclaimed from him the said A. and his heirs, to the aforesaid B. and his heirs for ever."

Co. Read. 2. 13. This species of fine is executed, and therefore gives the cognizee immediate possession of the land. It also passes an estate in fee simple without the word heirs; for when the cognizor acknowledges the lands to be the right of the cognizee, it would be repugnant and contradictory to his own acknowledgement to claim any estate in the lands, in remainder or reversion. Besides, in every judgement a fee simple was recovered; and the cognizance, or acknowledgement of the concord, coming in the place of a judgement, must have the same effect.

1 Inst. 9 *b.*

1 Salk. 340. 14. But if the concord be qualified by the express words of the parties, as if the lands are limited to the cognizee for life, or to the cognizee and the heirs of his body, the fine will then only pass an estate for life or in tail; for it would be absurd that a greater estate should pass than that which the parties themselves have limited; and the preceding donation

or feoffment, which is acknowledged in the fine, may as well be supposed to have been for life, or in tail, as in fee.

15. A rent cannot be reserved on a fine *sur cognizance de droit come ceo*, or on any other fine which is executed; because, as the cognizance supposes a preceding gift, the cognizor cannot reserve to himself any thing out of the lands whereof he has already conveyed away the absolute property: so that the *reddendum* comes too late, when a precedent absolute gift, without any such reservation, is before acknowledged. Roll. Ab. Tit. Fine, O. pl. 14.

16. The second sort of fine is called a fine *sur cognizance de droit tantum*, or upon acknowledgement of the right only, without the circumstance of a preceding gift by the cognizor. This species of fine is generally used to pass a reversionary interest, which is in the cognizor; for of such reversions there can be no feoffment or grant supposed; as the freehold and possession, during the particular estate, is vested in a third person. Sur Cognizance de Droit tantum. 1 Rep. 97 *a*.

17. This fine may also be used by a tenant for life, in order to make a surrender of his life estate to the person in remainder or reversion; and it is then called a fine upon surrender. Co. Read. 3.

18. The form of this fine is—"And the agreement is such, to wit, that the aforesaid A. hath acknowledged the aforesaid tenements, &c. to be the right of the said B.; and he hath granted, for himself and his heirs, that the aforesaid tenements which W. R. and M. his wife hold for the term of the life of G. of the inheritance of the said A. on the day on which this agreement was made, and which, after the decease of him the said G. ought to revert to the said A.

and his heirs, shall, after the decease of the said G., entirely remain to the said B. and his heirs for ever."

Co. Read. 6.

19. This fine is executory, and passes an estate in fee simple without the word heirs. It seems to have been the most ancient species of fine, for the demandant was obliged to follow the rules of law, and to sue out a writ of possession: but when it became usual to procure a feoffment of the lands first, a writ of possession was unnecessary; which probably gave rise to fines *sur cognizance de droit come ceo*, &c.

Co. Read. 3.

20. If there be tenant for life, remainder for life, and the first tenant for life levies a fine to the person in remainder, *sur cognizance de droit tantum*, it will operate as a surrender of his estate for life; because by this fine the tenant for life acknowledges all the right which he had in the lands to belong to the person in remainder.

Sur concessit. 2 Comm. 353.

21. The third sort of fine is called a fine *sur concessit*; where the cognizor, in order to make an end of all disputes, though he acknowledges no precedent right or gift, grants to the cognizor an estate *de novo*, by way of supposed composition; which may be either an estate in fee, in tail, or for life, or even for years.

22. The form of this fine is—"And the agreement is such, to wit, that the aforesaid A. hath granted to the aforesaid B. the aforesaid tenements, &c., to hold for 61 years." It is executory.

23. A fine *sur concessit* will not be allowed to be levied for the purpose of passing such estate as the party may have, by the description of all and whatsoever he hath in the tenements.

Seymour v. Barker, 2 Taunt. 198.

24. A man and his wife, being seised of different estates in different hereditaments, and intending to

pass them all, acknowledged the concord of a fine *sur concessit;* "to hold the said tenements, with the appurtenances, to the cognizee and his heirs, for and during all the term, and other estates, and all and whatsoever else the said S. and A. had in the tenements aforesaid, with the appurtenances." The chirographer of fines refused to make out the indentures, alleging, that the limitation must be certain, that is, to the cognizee and his heirs for ever, or for the life of the tenant, or *pour auter vie.*

The Court refused to permit the fine to pass.

Sur Done, Grant, and Render.

25. The fourth sort of fine is called a fine *sur done, grant, and render;* which is a double fine, comprehending the fine *sur cognizance de droit come ceo,* and the fine *sur concessit.* It is used in order to create particular limitations of estates; whereas the fine *sur cognizance de droit come ceo, &c.* conveys nothing but an absolute estate, either of inheritance, or at least of freehold: for in this fine the cognizee, after the right is acknowledged in him, renders or grants back to the cognizor some other estate in the lands.

26. The form of this fine is—"And the agreement is such, to wit, that the aforesaid A. hath acknowledged the aforesaid tenements to be the right of him the said B., as those which the said B. hath of the gift of the aforesaid A. And those he hath remised and quit claimed from himself the said A. and his heirs for ever, (warranty from the cognizor); and for this acknowledgement, remise, quit claim, warranty, fine, and agreement, the said B. hath granted to the said A. the aforesaid tenements, &c. And this he hath rendered to him in the same court, to hold the said tenements to the said A. and the heirs of his body."

Co. Read. 11. 2 Roll. Ab. 15.

27. In a fine of this sort, the render must be made of the lands demanded in the original writ, or of something issuing out of those lands. Thus, if the cognizance be made of the manor of Dale, the cognizee cannot make a render of the manor of Sale; or if the cognizance be made of the third part of a manor, the render cannot be made of the whole manor; because the Court can only determine the right of that about which the parties contended, and which was demanded in the original writ. But if the cognizor acknowledges all his right in the land to be in the cognizee, and the cognizee in return grants and renders to the cognizor a particular estate in the land, or a rent, or common, out of it, the render is good; because the determination entirely refers to the things in dispute; one party taking the ultimate property in the land, and the other a particular estate in it: all which is comprehended in the original writ.

28. It follows, from the same principle, that the lands must be rendered, in the first instance, to some person named in the original writ. But an estate may be rendered, by way of remainder, to a person not named in the original writ, as well as in any other kind of concord.

29. A fine *sur done, grant, and render*, is executed as to the first part, and executory as to the second; for if the first part was not executed, it would be void; as the cognizee can have nothing to render to the cognizor, till he is in possession.

30. In a fine of this kind the cognizee has only a seisin of an instant of that which he renders; which will not entitle his wife to dower. But still it is settled, that it operates as a feoffment and re-enfeoffment, and gives a new estate.

Tit. 6. c. 2.

infra, c. 12.

31. This species of fine being generally used to create particular limitations of estates, is construed rather as a private deed or conveyance, than as a judgement in an adversary suit; and therefore it need not have such a precise form as other fines. Touch. 18.

32. Husband and wife levied a fine to A. and B. and the heirs of A. of the manor of Layer de la Hay, Layer Britton, and several other manors, and of a great number of acres of land, meadow, pasture, &c. in those manors; in which several grants and renders were made. In the third render the manors of Layer de la Hay, Layer Britton, *et tenementa prædicta* in Layer de la Hay and Layer Britton, were granted and rendered to the husband and wife, and to the heirs of the husband; and by the fourth render, 115 acres of land in Layer Britton were granted and rendered to the wife in tail. After the death of the husband, his brother and heir brought a writ of error, and assigned for error the repugnancy between the third and fourth render; for, by the third render, all the lands in Layer Britton were granted to the husband and wife, and to the heirs of the husband; and by the fourth render, part of the same tenements were granted to the wife in tail: so that the same lands were granted to two different persons, which was repugnant and erroneous. And it was observed, that a fine was of the same nature with a judgement, and that Bracton says—*Oportet ut res certa deducatur in judicium.* Tey's Case, 5 Rep. 38.

The Court resolved, that the fourth render, as to that which was contained in the third render, should be of the same condition and quality in construction, as a charter or other conveyance between party and party, and need not have such a precise form as a writ of judgement; and therefore that the fourth

render was good, and should invalidate the third render as to the 115 acres.

1 Rep. 156 *a.* 33. If lands be rendered by fine to a person and his heirs, the lands are thereby immediately bound. And though the person to whom the render is made die before execution, yet his heir will have the lands; for the fine having been levied in the lifetime of the parties, the lands are so bound by it, that it cannot be altered. And a declaration of the uses of a fine of this kind, which is contrary to the grant and render, is void.

Jennings v. Chauntery, Clayt. 94.

TITLE XXXV.

FINE.

CHAP. IV.

In what Courts Fines may be levied, and before whom acknowledged.

1. *Fines originally levied in all Courts.*
4. *Court of Common Pleas.*
8. *Of the County of Lancaster.*
10. *Of the County of Chester.*
11. *Of the City of Chester.*
12. *Of the County of Durham.*
13. *Of Great Sessions in Wales.*
14. *Of the Isle of Ely.*
15. *Of Ancient Demesne.*
18. *Of Cities and Towns Corporate.*
20. *Who may take the Acknowledgement of Fines.*
21. *Ch. Just. of the Common Pleas.*
22. *Justices of Wales.*
23. *Commissioners under Writs of Dedimus Potestatem.*
35. *How the Acknowledgement is to be certified.*
46. *Rules of Court on this Subject.*

SECTION 1.

Fines originally levied in all Courts.

A FINE being a composition of a suit commenced for the recovery of real property, it might originally have been levied in any court which had jurisdiction to hold pleas of land. Accordingly, it appears, that in the early ages of the law, when courts were more numerous, and their jurisdiction more extensive, than at present, fines were frequently levied in the lord's court, the hundred court, and the county court. And in Dugdale's *Origines Juridiciales*, 92, there is a record of a fine which was levied in the county court of Nottingham, in the reign of King John.

Gilb. Ten. 100. Hale's Hist. 151. 3 Rep. Pref.

Dugd. Orig. Jur. 50—92. Madox Form. Angl. N° 364.

2. Fines were also levied in all the courts at Westminster, and even before the King himself, as appears from a great number of records which have been published in Spelman's Glossary, and by Dugdale and Madox.

Form Angl. N° 365. 6. 7. 9. Roll. Ab. Tit. Fine, C.

3. From the time of the appointment of justices in eyre, by King Henry II., fines were usually levied before them, on account of the pre-eminence of their courts over the county courts: and Madox has preserved several concords of fines which are expressed to have been levied *coram Abbate de Evesham, Johanne de Munmul, &c. Justiciariis itinerantibus.*

Court of Common Pleas. 4 Inst. 99.

4. In consequence of the fixed residence of the Court of Common Pleas at Westminster by *magna charta*, fines were thenceforth usually levied in that court; because therein only could real actions be commenced. However, if a record was removed by writ of error from the Court of Common Pleas into the Court of King's Bench, a composition of the suit might take place there; by which means a fine might be levied in that court.

2 Inst. 510. 515. Co. Read. 8.

5. It is enacted by the statute *de modo levandi fines*, that fines shall be levied in the Court of Common Pleas, or before justices in eyre, and not elsewhere; and that a fine must be levied at the least before four justices in the bench, or in eyre, and not otherwise. But Lord Coke says, that the latter part of this statute was repealed by the stat. 4 Hen. VII.; so that now a fine levied in the Court of Common Pleas, before two justices, is considered to be equally valid as if all the Judges were present.

Idem.

6. An opinion is advanced by Lord Coke, that a fine cannot now be levied, so as to have the force of a final concord, in any court but the Court of Common Pleas; and therefore that the King cannot now,

in contradiction to this negative statute, grant a power to hold pleas for the purpose of levying fines. He seems also to have been of opinion, that, since this statute, fines cannot be levied in any inferior court, unless the privilege of holding such court has been confirmed by act of parliament. But this is certainly a mistake; for fines may still be levied in inferior courts; as will be shown in a subsequent part of this chapter.

7. The counties palatine of Lancaster, Chester, and Durham, having courts of their own, the King's ordinary writs do not run there; so that fines could not be levied in the Court of Common Pleas at Westminster, of lands situated in those counties; but fines may now be levied in the courts of those counties, under the authority of the following statutes.

Of the County of Lancaster.

8. By the statute 37 Hen. VIII. c. 19. it is enacted, that all fines levied before the justices of the county palatine of Lancaster, commonly called justices of assize at Lancaster, or before one of them, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of Lancaster, which shall be openly read and proclaimed three several days in open sessions, in the presence of the justices of assize at Lancaster, or one of them, for the time being, and also that shall be openly proclaimed, in the same manner, at the two next general sessions that shall be holden in the said county palatine of Lancaster, at three several days in either of the said two sessions, after such manner and form as is commonly used in the Court of Common Pleas at Westminster, shall be of like force, strength, and effect in law, to all intents, effects, constructions, and purposes, as fines levied in the Court of Common Pleas.

1 Wils. R. 275.

9. If a fine is found by verdict to have been levied before the justices of the county palatine of Lancaster, without finding who those justices were, and whether they had power to take fines or not, the Court will presume them to be such justices as have power by statute to take fines in the county palatine of Lancaster, if the contrary does not appear.

Of the County of Chester.

10. By the statute 2 & 3 Edw. VI. c. 28. it is enacted, that all fines levied or acknowledged before the high justice of the county palatine of Chester, or before the deputy or lieutenant justice there, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of Chester, which shall be openly read and proclaimed three several days in the open sessions, in the presence of the justice of the said county palatine of Chester, or before the deputy or lieutenant justice there, at the same sessions that the same fine shall be engrossed, and also that shall be openly read and proclaimed in the same manner at the two next general sessions that shall be holden in the said county palatine of Chester, next after the levying and engrossing such fine, at three several days in either of the said two sessions, after such manner and form as is commonly used in the King's Courts of Common Pleas at Westminster, shall be of like force, strength, and effect in law, to all intents and purposes, as fines duly levied with proclamations before the King's justices of his Common Pleas.

Of the City of Chester.

11. By the statute 43 Eliz. c. 15. § 3. it is enacted, that it shall and may be lawful to and for all persons, upon any original writ or writs of covenant, or any other original writ or writs, whereupon fines have been usually levied, to be purchased out of the Court of Exchequer within the county palatine of Chester,

returnable before the mayor of the city of Chester in the Portmoot Court, to be holden within the said city, to levy any fine or fines of any lands, tenements, or hereditaments, lying or being within the county of the city of Chester, before the mayor of the said city, in the said Portmoot Court, in such manner and form as fines may be levied before the high justice of the county palatine of Chester; and that the mayor of the said city shall have full power and authority to receive and record all and every such fine and fines; and that all and every such fine and fines which shall be so levied, and which shall be openly read and proclaimed before the mayor of the said city, in the said Portmoot Court, once at the same court day that the said fine shall be engrossed, and once at every of the nine next court days of Portmoot next after the levying and engrossing of such fine, shall be of like force, strength, and effect in law, to all intents, constructions, and purposes, as fines duly levied with proclamations before the said high justice of Chester.

Of the County of Durham.

12. By the statute 5 Eliz. c. 27. it is enacted, that all fines levied before the justice or justices of the county palatine of Durham, for the time being, authorized for that purpose, of any lands, tenements, or other hereditaments, lying or being within the said county palatine of Durham, which shall be openly read and proclaimed two several days in the open sessions, in the presence of the justices of assize at Durham, or one of them, at the same sessions that the same fine shall be engrossed, and also that shall be openly read and proclaimed in the same manner at the two next general sessions that shall be holden in the county palatine of Durham next after the levying or engrossing of such fine, shall be of the

same force, strength, and effect in law, to all intents and purposes, as fines duly levied with proclamations before the Queen's justices of the Common Pleas at Westminster.

Of Great Sessions in Wales.

13. Upon the reduction of Wales, courts of justice were erected there, in which all pleas of real and personal actions were to be held; and fines of lands situated there are levied in those courts under the authority of the statute 34 & 35 Hen. VIII. c. 26. § 41., by which it is enacted, that all fines levied before the justices of Wales, of lands, tenements, and hereditaments situated within their jurisdiction, with proclamations made the same session that the said fine shall be engrossed, and in the two other great sessions then next to be holden within the same county, shall be of the same force and effect, to all intents and purposes, as fines levied with proclamations be of, that be levied before the justices of the Common Pleas of England.

Of the Isle of Ely.

4 Inst. 220.

14. The Isle of Ely is a royal franchise; the bishop having, by a grant from King Henry I., *jura regalia*, whereby he exercises both a civil and criminal jurisdiction; and therefore fines are levied in a court held by the bishop's justices, of all lands situated within that franchise.

Of Ancient Demesne. Diss. c. 3. § 13.

15. It has been stated, that tenants in ancient demesne could not sue or be sued for their lands in the King's courts, but had the privilege of having justice administered to them in the court of the manor by writ of *droit close*, directed to the lord of the manor whereof the lands were held.

2 Inst. 513.

16. In consequence of this privilege, no fine can be levied in the Court of Common Pleas at Westminster of lands held in ancient demesne; for that would be a wrong to the lord of whom the lands were holden,

as they would by that means become frank fee, and not impleadable in his court. But as such tenants were allowed to prosecute actions in the court of the manor, they were also permitted to compound their suits there; by which means fines have at all times been levied of lands held in ancient demesne, upon little writs of right close, in the court of the manor.

17. It was found, by special verdict, that the lands in question were held of the manor of Wormelow, which was *de antiquo dominico coronæ domini regis et antecessorum suorum*, impleadable in the court of the manor *per parvum breve de recto clauso, coram seneschallo sectatoribus et domesmen ejusdem manerii, sive eorum locum tenent. et attornat.* And that upon writs of right close, fines had been time out of mind levied, and leviable in the same court. That Thomas Guillym was seised in tail of the said lands, and being so seised, in 22 Cha. I. a fine was levied in the said court, *secundum consuetud. prædict.*, before A. B. *locum tenent. W. Kyrle seneschalli et R. attornat. J. S. & W. attornat. J. N. ad tunc sectator. et domesmen ejusdem curiæ.* Then the fine was set forth, which appeared to have been levied before the attornies of the suitors, *in placito conventionis secundum consuetudinem manerii, &c.* Hunt v. Bourne, Salk. 339. Com. R. 93. 124.

It was determined by Lord Holt and the other Judges, that a fine might be levied of lands held in ancient demesne, in the court of the manor, though it was not a court of record; because it was but agreeable to the power of that court in other instances, for they might proceed to try the mise joined in a writ of right close, which was of a higher nature than a fine; whereas, in all other inferior courts, on the mise joined, the cause must be removed into the Dyer, 111 *b.*

Fitz.N.B.12. Court of Common Pleas by *recordari*. And the ante, § 5. statute 18 Edw. I. *de modo levandi fines*, was but declaratory of the common law, and was made to rectify a mistake, that fines were leviable in inferior courts, upon bills or plaints, which could not be, either by grant or custom, by reason of the negative words of that statute. But this did not extend to courts of ancient demesne, for then the stat. 18 Edw. I. would make fines of those lands leviable in the Court of Common Pleas; which was not the case; such fines infra, c. 14. being reversible by the lord. So that tenants in ancient demesne would be under a double disadvantage; for a fine could not be levied of their lands in any 4 Bro. Ca. in Parl. 66. court. This judgement was affirmed by the House of Lords.

Of Cities and Corporate Towns. 18. Fines may be levied in the courts of cities and corporate towns, where such courts have power to hold pleas of land. Thus, Madox has published a Form. Ang. No 379. 394. record of a fine levied in the town court of the city of Coventry, before the mayor and bailiffs; and also a fine levied in the court of Fordwick, to which King Henry VIII. was a party.

A fine of this kind is, however, void, and may be reversed, unless it appear that the court had a power of taking fines.

Waring v. Whale, Cro.Eliz.314. 19. In a writ of error to reverse a fine levied in Shrewsbury, before the bailiffs there, the first error assigned was, that it did not appear they had any authority to take fines; and they could not have it by prescription, or by general words in the King's grant.

The Court said, the fine was void; it not appearing by what authority it was levied; for it was in derogation of the Crown, and of its profits *pro licentia concordandi*.

Who may take the Acknowledgement of Fines.

20. With respect to the persons who may take the acknowledgement of fines, it appears that originally those who were desirous of levying fines, acknowledged the concord in person, in open court. And fines are still frequently acknowledged in the same manner; the parties appearing personally at the bar of the Court of Common Pleas. But fines may also be acknowledged out of court.

Chief Justice of the Common Pleas.

Co. Read. 9.

2 Inst. 512.

21. The Lord Chief Justice of the Court of Common Pleas may alone take the acknowledgement of a fine out of court; a privilege peculiar to that office, and which seems to be derived from custom and usage; for it does not appear that this power is given by any statute. But if the Lord Ch. J. of the Court of Common Pleas be a party to the writ, he cannot take the acknowledgement of the fine, *quia judex in propria causa.* A rule which extends to all other judges and commissioners.

Dyer, 220 *b.*

Justices of Wales.

22. By the statute 34 & 35 Hen. VIII. c. 26. § 40. it is enacted, that fines shall and may be taken before the justices of Wales, of lands, tenements, and hereditaments situated within their jurisdiction, by force of their general commission, without any writ of *dedimus potestatem* to be sued for the same, in like manner and form as is used to be taken before the King's Chief Justice of the Common Pleas in England.

Commissioners under a Writ of Dedimus Potestatem.

15 Edw II.

1 Inst. 512.

23. The great inconvenience of compelling old and infirm persons to travel from the most remote parts of the kingdom to Westminster, produced a regulation which is usually called the statute of Carlisle, but which, in fact, is a writ addressed by Edw. II. to the judges, for their government in taking the acknowledgement of fines. It ordains, that all parties who would acknowledge or render their rights or tenements to another by fine, should appear personally

before the justices, so that their age, idiocy, or any other defect, might be judged of by them. "Provided notwithstanding, that if any person be, by age or impotence, decrepit, or by casualty so oppressed and withholden, that by no means he is able to come before you in our court, then in such case we will that two or more of you, by assent of the residue of the bench, shall go unto the party so diseased, and shall receive his cognizance, upon that plea and form of plea that he hath in our court, whereupon the same fine ought to have been levied: and if there go but one, he shall take with him an abbot, a prior, or a knight, a man of good fame and credit, and shall certify you thereof by the record, so that all things incident to the same fine being examined by him or them, the same fine, according to our former ordinance, may be lawfully levied."

24. In consequence of this regulation, a special commission issues out of the Court of Chancery, called a writ of *dedimus potestatem*, directed to a certain number of commissioners, reciting, that a writ of covenant is depending before the Justices of the Court of Common Pleas, between certain persons therein named, who are incapable, from infirmity, of appearing personally before the court, and authorizing the commissioners to take the acknowledgement of the said parties concerning the matters contained in the writ; and directing them to certify such acknowledgement, under their hands and seals, to the Court of Common Pleas.

ante, § 11. 25. It has been stated, that by the statute 43 Eliz. fines may be levied in the court of the county of the city of Chester. By the 5th section of that statute it is enacted, that upon all original writs purchased out of the Court of Exchequer of the county of

Chester, for the levying of any fine or fines within the city of Chester, the mayor of the said city for the time being shall have full power and authority to award and send forth such like writ or writs, process or precepts of *dedimus potestatem*, to any two or more sufficient persons, authorizing them to receive and take the acknowledgement of such person or persons as shall be willing to levy such fine or fines, and by reason of sickness or other reasonable impediment cannot come in person before the said mayor to make such acknowledgement.

26. The statute of Carlisle only gives authority to two of the justices, or to one of them, attended by an abbot or knight, to take the acknowledgement of fines. But notwithstanding this restriction, writs of *dedimus potestatem* were frequently directed to persons of inferior quality; from whence many abuses arose, which gave rise to a rule of court made in 43 Eliz., by which it was ordered, that no writ of *dedimus potestatem*, directed to commissioners to take the acknowledgement of any fine, should be received or recorded, unless the acknowledgement was taken by some of the Justices of the one Bench or other, or Barons of the Exchequer, or serjeants at law, or knight who was of the *quorum*. Custom, however, so far prevailed against the positive authority, both of the statute and of this rule, that although a knight was always named in a writ of *dedimus potestatem*, yet he seldom was one of those who took the acknowledgement of a fine.

Co. Read. 9, 2 Vent. 30.

Wils. 95.

27. The judges of assise may, in their circuits, *per consuetudinem regni*, take the acknowledgement of fines, without any writ of *dedimus potestatem*; on account of the great confidence which the law places

Dyer, 224 *b*. Jenk. 227.

in their judgement and integrity.* In such cases, however, a writ of *dedimus potestatem* ought to be sued out, bearing date before the acknowledgement of the fine; although, if the writ of *dedimus potestatem* be tested after the date of the acknowledgement, still the fine will be supported.

Argenton v. Westover, Cro. Eliz. 275.

28. A writ of error was brought to reverse a fine, and the error assigned was, that it appeared upon record that the acknowledgement of the fine was taken by Chief Baron Manwood, on the 27th of March, and the writ of covenant and *dedimus potestatem* were tested on the 9th of April, so that the acknowledgement was taken without any authority; and by the statute 23 Eliz, the day of the acknowledgement ought always to be certified; but the Court over-ruled this objection, saying, it was good enough, and that otherwise they should reverse many fines.

1 Bos. & Pul. 362.

29. By an order of the Court of Common Pleas, made in Michaelmas term, 39 Geo. III., reciting, that the Lord High Chancellor had been pleased to direct that no writ of *dedimus potestatem*, to be executed in England, should issue under the great seal, directed to any persons except the judges, serjeants at law, barristers of five years standing, or solicitors or attornies of some of the courts in Westminster Hall, the Judges of the Court of Session and Exchequer, advocates and clerks to the signet of five years standing in Scotland; it is ordered, that from and after the

* There is a petition in the Rolls of Parliament, 28 Edw. III. No. 26. vol. 2, p. 261. from the Commons beyond Trent, praying that a justice of one or the other bench should come twice each year into their counties, to take the acknowledgement of fines.

last day of the said Michalmas term, no fine shall be suffered to pass, unless the caption of such fine be before one of the justices or barons of his Majesty's courts of record in Westminster Hall, or one of the serjeants at law, unless an affidavit be made and filed, stating, that the commissioners taking the same are, to the best of the deponent's information and belief, either barristers of five years standing, or solicitors in some of the courts in Westminster Hall, the Judges of the Court of Session and Exchequer, or advocates and clerks to the signet of five years standing in Scotland.

30. It is the duty of all those who are appointed commissioners in a writ of *dedimus potestatem*, to inform themselves, by means of some people of credit, that the persons who acknowledge a fine before them are really the parties named in the original writ. They should also be extremely attentive in examining whether there be any married woman, infant, ideot, or lunatic, among the parties to the fine; as they are *liable to* be severely punished by the Court of Common Pleas for any fraud or wilful neglect in the execution of their office. Petty's Case, 1 Freem. 78.

Although the writ of *dedimus potestatem* still appears to be granted upon a suggestion of infirmity in the parties, yet such suggestion is seldom true; the writ being usually obtained to save the expence or inconvenience of a journey to Westminster; or for the purpose of levying a fine in vacation time.

31. The writ of *dedimus potestatem* recites, that a writ of covenant is depending between the parties, and therefore should bear date after the writ of covenant. Co. Read. 9. 1 Roll. R. 223.

32. A writ of error was brought to reverse a fine levied at Chester, because the *teste* of the writ of Goburn v. Wright,

Cro. Eliz. 740. Vide 13 Vin. Ab. 333.

dedimus potestatem was prior to that of the writ of covenant; and it was held to be a manifest error.

33. But if the writ of *dedimus potestatem* be tested on the same day with the writ of covenant, the fine will be good.

Arundel v. Arundel, Cro. Eliz. 677.

34. A writ of error was brought to reverse a fine, on the ground that the writ of *dedimus potestatem* was tested the same day with the writ of covenant; which was contended to be erroneous, because the writ of *dedimus potestatem* recites that the writ of covenant is depending, whereas the writ of covenant could not be said to be depending until its return.

The Court was of opinion that this was no error, for the writ of covenant might be said to be depending immediately on the purchase of it; and if a stranger should buy the land before the return of the writ of covenant, it would be champerty.

How the Acknowledgement is to be certified.

35. By the statute 23 Eliz. c. 3. § 5. it is enacted, "That every person that shall take the knowledge of any fines, or shall certify them, shall, with the certificate of the concord, certify also the day and year wherein the same was knowledged. And that no clerk or officer shall receive any writ of covenant whereupon any fine is to pass, unless the day of the knowledge of the same fine shall appear in or by such certificate; upon pain that every clerk that shall receive any such writ, shall forfeit for every time that he shall so offend, the sum of five pounds.

Fitz. N. B. 146.

36. If the commissioners in a writ of *dedimus potestatem* refuse to certify the acknowledgement of a fine, pursuant to this statute, within twelve months, a *certiorari* may be awarded against them, reciting the substance of the writ of *dedimus potestatem*, and the acknowledgement of the fine, and commanding them to certify it; and in case of their refusal, an

alias, a *pluries*, and an attachment, will issue against them.

37. If the commissioners die before they have certified the acknowledgement of a fine, their executors must certify it upon a *certiorari*; and in case of their refusal, the same process lies against them, as against the commissioners. Idem.

38. If a person has several writs of covenant depending against several persons in different counties, he may have a writ of *dedimus potestatem* directed to commissioners, to take their acknowledgements severally. Idem 327.

39. If a writ of *dedimus potestatem* be directed to two persons jointly, and only one of them takes the acknowledgement of the fine, it will be erroneous. Downes v. Savage, Cro. Eliz. 240.

40. A writ of *dedimus potestatem* was awarded to take the acknowledgement of four persons to the same fine. The commissioners returned the acknowledgement of three of the persons only. The Court resolved that the fine should pass, as against the three persons who had acknowledged it; and that the name of the fourth person should be erased out of the writ of covenant and *dedimus potestatem*. Anon. Cro. Eliz. 576.

41. It was resolved in the same case, that if a writ of *dedimus potestatem* be awarded to take the acknowledgement of three persons to the same fine, the commissioners need not take the acknowledgement of all the three persons at the same time, but may take the acknowledgement of one of them at one time, and of another at another time.

42. All the acknowledgements must however appear on the same parchment, otherwise the fine will not be allowed to pass.

43. A writ of *dedimus potestatem* had been directed to commissioners, to take the acknowledgement of Balch v. Phelps. 3 Bos. & Pul. 366.

nine persons. The commissioners took the acknowledgement of six out of the nine persons on one piece of parchment, and of the remaining three upon another piece of parchment; which mode of taking the acknowledgements was objected to by the officers.

On a motion that the fine might pass, Mr. Justice Heath said, that these separate acknowledgements would not warrant a joint judgement; and the motion was refused.

44. A fine will not, however, be reversed for any trifling error or mistake in the return made by the commissioners under a writ of *dedimus potestatem.*

Bedford v. Forster, 1 Cro. Ja. 27.

45. A writ of error was brought to reverse a fine taken by commissioners, because upon the back of the writ of *dedimus potestatem* it was stated thus;—*Executio istius brevis patet in quodam panello huic brevi annexo.* But all the court held it was matter of form, and not material; for although it be not properly said to be a pannel, yet a pannel and a schedule are all one in substance, and no cause to reverse the fine.

Rules of Court on this Subject.

46. By a rule of the Court of Common Pleas, made in Hil. 13 Geo. I. it was directed, that no fine acknowledged before commissioners should be allowed to pass, unless some person who was present when the fine was acknowledged should appear personally before the Lord Ch. J. of the Court, and be examined upon oath touching the execution thereof.

This rule having been found by experience to be attended with inconveniences, and not having answered the good purposes for which it was intended, the Court made the following rules:

Wilson, 85.

47. Hil. 17 Geo. II. "That instead of an oath made *vivâ voce* of the due acknowledgement of fines, an affidavit in writing on parchment shall be made

and annexed to every fine, in which the person making the same shall swear that he knew the parties acknowledging such fine; that the same was duly signed and acknowledged; that the party or parties acknowledging, and also the commissioners taking the same, were of full age and competent understanding; that the feme coverts (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same; and that the cognizor or cognizors, and every of them, knew the same to be a fine to pass his, her, or their estate or estates: which fine, together with such affidavit annexed, shall be transmitted to the Lord Chief Justice, or some other Justice of this Court, for his *allocatur* thereon, and such affidavit shall remain annexed to such fine, and be left with the same in the proper office: and it is ordered that every such affidavit, except where the persons, at the time of their acknowledging the fine, are in Ireland, or some other parts beyond the seas, shall be made by some attorney of the courts of Westminster Hall."

48. Hilary 26 & 27 Geo. II. "It is ordered, that in the affidavits made in pursuance of the preceding rule, the person or persons so making the same shall swear that the fine was duly signed and acknowledged upon the day and year mentioned in the caption; and if there be any rasure or interlineation in the body or caption of such fine, that such rasure or interlineation was made before the party or parties signed the said fine, and before the caption was signed by the commissioners." Wilson, 89.

49. A fine was taken before Prentice an attorney, and Prentice a tradesman, as commissioners. Prentice the attorney died without making the proper affidavit of the acknowledgement of the fine. One of the Say v. Smith, Barnes, 217.

cognizors became a bankrupt, absconded, and did not surrender within the 42 days, as required by the statute. The fine was ordered to pass, on an affidavit of the due acknowledgement of it by Prentice the tradesman; notwithstanding the general rule requiring such affidavits to be made by attornies.

50. Where fines have been acknowledged out of the kingdom, the Judges have also remitted the strictness of these rules.

Fleetwood v. Calenda, Barnes, 219.

51. The Lord Ch. J. assisted by Mr. Clive, made an order that a fine should pass as to two of the cognizors, considering the particular circumstances of the case, notwithstanding the same was not signed by them. One of the commissioners attended and made oath that the fine was duly acknowledged before him and another commissioner at Naples; that the parties were of full age and good understanding; that the married woman was examined apart from her husband, and freely consented. The fine being taken from persons beyond seas, it was not within the order of the Court, requiring an affidavit; and the signing of a fine by the cognizors was not absolutely necessary.

Heathcock v. Hanbury, Barnes, 217.

52. Two fines taken at Hamburg, where the cognizors resided, were ordered to pass by all the four Judges, upon an affidavit by a commissioner of the due execution of each fine, sworn before a clerk in the Chancery of the city of Hamburg; and authenticated by his certificate or attestation, as a notary public.

Seton v. Sinclair, 2 Black. R. 880.

53. A fine was taken at Edinburgh, and was regular in every respect, except that it was not acknowledged in the presence of an attorney of any of the courts of Westminster Hall, who might have made the usual affidavit of its having been duly

taken. An affidavit was made by Seton, the plaintiff, that there was no such attorney in or near Edinburgh. And the Court, on the motion of Serjeant Davy, who cited the case of Say v. Smith, allowed the fine. ante, § 49.

54. The notarial certificate required in the case of a fine acknowledged in a foreign country, must be under seal. A defect in this particular cannot be supplied by proof of the hand-writing of the cognizors.

55. Henry Count Bourbell and Mary his wife, the conuzors in the fine, were resident in France, and the acknowledgement was taken before commissioners in that country; the affidavit of the due taking purported to be sworn before the mayor of the city of Neufchatel, and was subscribed with his name. A certificate that that person was mayor of the said city was signed by two persons, who stated themselves to be public notaries; but no notarial seal was annexed. Crutteuden v. Bourbell, 1 Taunt. 144.

The Court said they could not supply the defect arising from the want of a seal. There was no rule of court expressly applying to the case of fines levied by persons resident abroad; but the rule relative to recoveries suffered by persons under these circumstances, had always been held to extend to the case of fines; by that rule a seal was necessary.—The fine was not allowed to pass. Tit. 36. c. 3.

TITLE XXXV.

FINE.

CHAP. V.

Of the Parties to a Fine.

1. *Who may levy Fines.*
3. *The King.*
4. *The Queen.*
5. *Married Women.*
17. *Joint Tenants, Coparceners and Tenants in Common.*
18. *Persons outlawed.*
19. *Who are incapable of levying Fines.*
20. *Persons having no Estate.*
35. *Aliens.*
36. *Infants.*
44. *Exception—Infant Trustees.*
47. *Idiots and Lunatics.*
51. *Corporations.*
52. *Who may take by Fine.*

Section 1.

Who may levy Fines.

A FINE being considered as a common assurance or conveyance of real property, it follows that all persons of full age and sufficient understanding, may in general levy fines of those lands in which they have any estate of freehold, either by right or by wrong.

Elliot's Case, Carter, 53. Griffin v. Ferrers, Barnes, 19, Keys v. Bull, Id. 23.

2. Even persons who are blind, deaf, or dumb, or who are both deaf and dumb at the same time, may levy fines; if it appear that, notwithstanding those disabilities, they are capable of comprehending the nature and consequences of a fine, and can express their meaning by writing or signs. And there are three instances of persons born deaf and dumb, who were permitted to levy fines.

The King. Dugd. Orig. Jur. 93. Mad. Form. No. 394. 7 Rep. 32.

3. There are several records of fines published by Dugdale and Madox, to which the King was a party. It was however much doubted in the reign of James I. whether the King could levy a fine; and His Majesty having consulted Lord Ch. J. Popham and Lord Coke, who was then Attorney General, on this subject, they gave it as their opinion, that although the King could not be cognizor of a fine, because a writ of covenant could not be brought against him; yet, that if a fine was levied to the King, he might then make a grant and render, which would be good, and sufficient to bind him.

The Queen. 1 Inst. 3 *a.* 133 *a.* 4 Rep. 23 *b.*

4. The Queen may levy a fine, and a fine may be levied to her: for she has in every instance the particular privilege of suing and being sued alone; and is considered in all legal proceedings as a feme sole, and not as a feme covert.

Married Women. Lib. 2. c. 3. Form. Ang. No. 357.

5. As married women might always be impleaded jointly with their husbands, it follows that they could join with their husbands in levying fines: and it appears from a passage in Glanville, and some very ancient records published by Madox, that it was formerly usual for married women to appoint their husbands, as their attornies, to levy a fine for them.

Mad. Diss. § 18.

6. Thus in 9 Rich. I. the prior and convent of Lewes fined to the King in half a mark, *ut concordia facta inter Ricardum de la Combe, & Sybillam de Dene, uxorem suam, presentes per eundem Ricardum virum suum, positum loco suo, ad lucrandum vel perdendum, et Willielmum priorem et conventum de Lewes tenentem, per Willielmum monachum suum de advocatione ecclesiæ de Waldern, unde recognitio de ultima presentatione summonita fuit inter eos in prefata curia, scribatur in magno rotulo.*

7. It is probable that married women were, in consequence of this practice, frequently deceived, and defrauded of their inheritances, by their husbands. The statute *de modo levandi fines* therefore directed,

2 Inst. 515. that if a feme covert be one of the parties to a fine, she ought first to be examined by four of the justices, and if she refused her assent to the fine, it should not be levied.

Idem. 3 Atk. 712. 8. When a married woman is party to a fine, she ought to be examined secretly and apart from her husband, pursuant to this statute, in order that the Judges or commissioners may inform themselves whether she joins in the fine of her own free will, or is compelled to it by the threats or menaces of her husband. Every thing contained in the writ should be distinctly named to her, and she ought to be informed of the consequences of her assenting to the fine. But although the statute *de modo levandi fines* thus positively directs the private examination of a married woman, yet if she is allowed to acknowledge a fine, without being examined, it will bind both her and her heirs for ever; there being no mode of

ante, c. 2. § 60. reversing such a fine; because it cannot afterwards be averred that the married woman was not examined, the contrary being recorded.

2 Inst. 515. The private examination of a married woman is however not directed in all cases; as that circumstance was prescribed by the legislature only to prevent married women from making an imprudent disposition of their property, at the instance of their husbands: so that where a husband and wife acquire any interest by a fine, and depart with nothing, the wife need not be examined, because in that case she

Lit. § 670. 1 Inst. 353 b. cannot possibly be prejudiced. It may therefore be laid down that a married woman need only be privately

examined, where she joins in granting some estate, or departing with some interest.

9. Thus if a fine be levied to a husband and wife, who grant and render a rent, the wife ought to be examined; because by the render she makes herself liable to the payment of the rent. Roll. Ab. Tit. Fine, M. 1.

10. If a married woman levies a fine of her own inheritance, without her husband, it will bind her and her heirs, because they will be estopped to claim any thing in the lands; and cannot be admitted to aver that she was a married woman, that being contrary to the record. But her husband may enter and defeat such fine, either during the coverture, to restore himself to the freehold which he held *jure uxoris*; or after her death, to restore himself to his tenancy by the curtesy; because no act of a feme covert can transfer that interest, which the marriage has vested in the husband. And if the husband avoids the fine during the coverture, neither the wife nor her heirs will be barred by it; for by the entry of the husband the whole estate which passed by the fine is defeated, and the old estate of the wife revested in her; so that the husband becomes again seised *jure uxoris*. And an entry by the husband into part of the land, whereof the wife alone levied a fine, will avoid the whole fine. 1 Inst. 46 *a*. 7 Rep. 43 *a*. 10 —— 46 *a*. Hob. 225. 1 Inst. 46 *a*. n. 7. Mayo v. Coombes, 1 Freem. 396. Pollex. 164.

11. If a married woman levies a fine executory as a *feme sole*, and execution is sued against the husband and wife, the husband may stop the execution of the fine; because no act of his wife's can prejudice him. And if in a case of this kind the husband had made default, and his wife was received in his stead; she might, for the benefit of her husband, prevent the execution of her own fine: but after the death of her husband she cannot avoid it. Co. Read. 7. Perk. § 20.

1 Sid. 122.

12. If a woman levies a fine by the name of Mary the wife of Thomas Stiles, it will be void; because it appears by the very record itself, that the cognizor was a married woman.

13. There is no case in which the Court has authenticated a fine levied by a married woman without her husband.

Moreau's Case, 2 Black. R. 1205.

14. Upon a motion that Ann Moreau, wife of —— Moreau, might levy a fine without her husband; it appeared that the lands had been sold by the husband, who covenanted that he and his wife, when of age, should levy a fine. When the wife came of age, she refused to join in it; but it was levied by the husband alone, who went abroad. Afterwards the wife consented to levy it, but the husband was absent.

It was said that it had been usual in such cases for the cursitor to make out a *præcipe* to the wife, as a feme sole; but no example of it was produced upon the motion.

The Court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse*, before the Lord Chief Justice then in Court.

Stead v. Izard, 4 Bos. 312.

15. The estate of a married woman having been regularly sold, the conveyances duly executed by the husband and wife, and the purchase money paid, the husband became insane.

Upon an application to allow the wife to acknowledge the fine without her husband, the Court said they should make no order on the subject; but that it appeared to them there was no objection to the acknowledgement of the fine being taken. *Valeat quantum.*

Ex parte Abney, Taunt. 37.

16. In a subsequent case the Court refused to interfere to pass a fine levied by a married woman in

the absence of her husband, who had become a bankrupt, had omitted to surrender himself, and was gone beyond sea.

17. Joint tenants, coparceners, and tenants in common, may levy fines of their respective shares; and if there be two joint tenants in fee, and one of them levies a fine of the whole, this will not amount to an ouster of his companion; but it will operate as a severance of the jointure, though they continue to be in of the old use.

Joint Tenants, Coparceners, and Tenants in Common. 1 Rep. 58 *a*. 6 Mod. 45. 1 Salk. 286.

18. Persons outlawed, or waived in personal actions, may alien by fine; for their estates still remain in them, although they have forfeited the rents and profits.

Persons outlawed, &c. West Symb. p. 2. § 13.

19. Having enumerated the persons who are capable of levying fines, we shall now examine who are incapable of being cognizors, or conveying by fine. This may arise, either for want of a sufficient estate in the lands, a competent degree of judgement and understanding, or from being incapacitated by their situation.

Who are incapable of levying Fines.

20. No person can levy a fine of lands that will affect strangers, unless he has at least an estate of freehold in possession, either by right or by wrong; otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it: so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in possession in the lands whereof the fine is levied, it will only bind the parties themselves and their heirs, but may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands, at the time when the fine was levied.

Persons having no Estate. 5 Rep. 123 *b*. 3 Atk. 141. infra, c. 14.

Berrington v. Parkhurst, Tit. 36. c. 2. vide infra, c. 14.

21. A person entitled to an estate tail in remainder, levied a fine of it, jointly with his son, who had no freehold estate: and it was held by the House of Lords that this fine had no effect.

5 Rep. 77 *b.*

22. If a person who is only possessed of lands for a term of years, or who holds them by statute merchant, statute staple, or writ of *elegit*, levies a fine of them, it will have no effect whatever, as to strangers, because the cognizor has no estate of freehold.

Co. Cop. § 55.

23. It follows from the same principle, that if a copyholder levies a fine of his copyhold, it is void, because the freehold is in the lord.

1 Inst. 330 *b.* *n.* 2. Lev. 52. Tit. 32. c. 4.

24. The only mode by which a tenant for years, or a copyholder, can levy a fine, so as to give it any force, is, by first making a feoffment, by which means he acquires a freehold by disseisin. This doctrine has, however, been questioned by Lord Mansfield, in the case of Taylor v. Horde, but is notwithstanding admitted by some practitioners.

Doe v. Williams, Cowp. 621.

25. The tenant in possession will not be allowed, as an evidence, to prove the estate of a landlord who levies a fine; because he would then be a witness to support his own possession.

3 Rep. 79 *b.*

26. It is admitted that a disseisor may levy a fine. So if a person enters under a devise that is void, he thereby acquires a freehold by abatement, and may levy a fine.

Hulme v. Heylock, infra, c. 10.

27. If the heir at law enters, notwithstanding a devise in favour of some other person, and levies a fine it will be good.

28. Where a person has a seisin in law, by the descent of lands upon him, he may levy a fine.

Hemsley v. Price, Cro. Eliz. 639.

29. A. devised lands held by knight service, which was then void as to a third part, to J. S. in fee, who granted a lease of the whole, and the lessee occupied

under this lease for three years; afterwards the heir at law levied a fine. It was resolved, that this entry and lease by J. S. only gained him the possession of two-thirds, he being tenant in common with the heir, and that the heir was never out of possession of the remaining third; so that his fine was good. Tit. 20. § 14.

30. A person having a defeasible right only to lands may, notwithstanding, levy a fine of them; which cannot be set aside by the plea, that neither of the parties had an estate of freehold in the lands.

31. Sir Michael Armin being seised in fee of the manor of Pickworth and Willoughby, by his will devised, that in case his personal estate, &c. should not be sufficient to pay his debts, then his executors should receive the rents and profits of his whole real estate; and after payment thereof, he devised the manors of Pickworth and Willoughby to his uncle Evers Armin for life; and in case he should have issue male, then to such issue male and his heirs for ever; and in case he should have no issue male, he devised the manor of Willoughby to his nephew Sir Thomas Barnadiston in fee. Upon the death of Sir Michael Armin, Evers Armin entered upon the premises devised to him, and devised them to his grandson Armin Bullingham, and the heirs of his body. Upon the death of Evers Armin, Sir Thomas Barnardiston entered upon the premises, claiming the same by virtue of the remainder limited to him by the will of Sir M. Armin. Armin Bullingham, the devisee of Evers Armin, entered upon the manor of Willoughby, claiming title thereto, and put his cattle into some part of the land, upon which ensued a replevin, and the special verdict in 3 Lev. 431. and 2 Salk. 224. This suit was afterwards compromised between Sir Thomas Barnardiston and Armin Bullingham, who

Carter v. Barnardiston, 1 P. W. 505. 13 Vin. Ab. 336.

both joined in a fine of the manor of Willoughby; but previous to this, Sir Thomas Barnardiston had conveyed the premises by lease and release to Sir Samuel Barnardiston in mortgage.

It was contended that this fine was void, as neither of the parties had an estate of freehold in the lands; but the Lord Chancellor held, "that in this case it could not be said that *partes finis nihil habuerunt*, because Armin Bullingham, on the death of Evers Armin, and as his devisee, had a right against all persons whomsoever but the heir of Sir Michael Armin the testator, and Barnardiston, entering upon him as a disseisor; and though Barnardiston afterwards mortgaged the premises in fee, yet he continued in possession thereof, and joining with Bullingham in the fine, it could not be said that *partes finis nihil habuerunt*, when one of them, viz. Barnardiston, had the possession, and the other of them, viz. Bullingham, had the right to the land against Barnardiston, and also against his mortgagee."

32. In a subsequent case it was held by Lord Hardwicke, that where persons who had taken possession by wrong, had levied a fine before any receipt of rent, such fine had no effect.

Townsend v. Wyndham Ashe, MS. Rep. 3 Atk. 336.

Dame Mary Ashe, being seised in fee of two 36th shares of the King's moiety of the New River waterworks, by indenture, in 1698, between her, Sir James Ashe her son, and Catherine his wife, of the first part, Lord Townsend and Joseph Yate of the second part, and trustees of the third part, for making a provision for the said Catherine, and for settling the lands therein mentioned to the uses therein expressed, conveyed *inter alia* the said two shares to Lord Townsend and Yate, to the use of Lady Ashe for life, remainder to Sir J. Ashe for 99 years, if he

should so long live, remainder to trustees to preserve contingent remainders; remainder, as to one of the said shares, to the use of all and every the child and children of the said Sir J. Ashe, except his heir, as tenants in common, and of the heirs of their bodies; and for default of such issue of any or either of such children, to the use of the others of them not being heir, &c. in tail; and for default of issue of all such children, to the use of both or either of the two sisters of the said Sir J. Ashe, namely, Catherine Wyndham and Martha Ashe, or either of their children, and of the children of Lady Townsend, for such estates as Sir J. Ashe should appoint; and as to the other of the said shares, to the use of such of the children of the said Sir J. Ashe, or such of his sister's children, as he should appoint: and after the determination of the estates so to be appointed, if any such should be, as to one third of the said two shares, to the use of Catherine Wyndham in tail, remainder, as to one moiety of the said third part, to the use of the said Lord Townsend, Roger Townsend, and the plaintiff Horace Townsend, the three sons of Lady Townsend, as tenants in common in tail, with cross remainders, remainder to Sir J. Ashe in fee; and as to the other moiety of the said third part, to Martha Ashe in tail, remainder to Lord Townsend, Roger, and Horace, as tenants in common in tail, with cross remainders, remainder to J. Ashe in fee; and as to the other moiety of the said third part, to Martha Ashe in tail, remainder to Lord Townsend, Roger, and Horace, as tenants in common in tail, with cross remainders, remainder to J. Ashe in fee.

Sir J. Ashe died in 1733, without issue male, leaving one daughter, Martha, married to the defendant, Wyndham Ashe, and not having made any appoint-

ment. Martha Ashe, one of the sisters of Sir. J. Ashe, to whom one third of the premises was limited, died also without issue.

The plaintiffs, Lord Townsend and Horace Townsend, claimed one moiety of the two shares, under the limitations in the settlement. The defendants, Mr. Wyndham Ashe and his Lady, insisted that, after Sir J. Ashe's death, they had, by bargain and sale enrolled, conveyed the said two shares, *inter alia*, to A. and his heirs, that thereby, and by fines agreed to be levied, he might become tenant to the *præcipe* in a recovery to be suffered of the premises; and that fines were accordingly levied of the said two shares, in Hil. 1733; and insisted on the said fines and non-claim, in bar of the plaintiffs' right.

It appeared by proof in the cause, that at the time of levying the fines, the defendants had not received any profits of these shares; but that on the 23d of February, 1733, they received the first payment from the Company, which was due the Christmas before; and they afterwards continued receiving the rents till 1740, and were then ignorant of the plaintiffs' right.

It was argued for the plaintiffs, that the fines and non-claim had no way barred their right, there being a great difference between taking possession by one who has right, and one who comes in by wrong: in the one case, the heir is in possession, and has an immediate seisin in law, upon his ancestor's death; and that a *præcipe quod reddat* will lie against him who has a freehold in law, appeared from 1 Inst. 358. But he who comes in by wrong, must do something to divest the freehold of him who has right, and put it in himself; as laid down by Lord Holt in Symonds v. Cudmore, Carth. 260. That

some entry must be made by the disseisor, in order to obtain such a seisin as to enable him to levy a fine. That in this case the defendants had done nothing to vest the freehold in them, either by right or by wrong: not by right, for they had none; nor by wrong, for it did not appear that they had done any act, or observed any ceremony or circumstance, necessary to gain a freehold. That this was not properly a disseisin, but an intrusion; 1 Inst. 227 *a.* And an entry might have been made in this case, by taking up some of the water, cutting a turf, or doing some other solemn act that the law takes notice of. That these shares were corporeal inheritances; and fines might be levied of them, by the name of land *aqua cooperta.* And though it was alleged for the defendants that they made a claim, yet that was not sufficient, where an entry ought to have been made; 1 Inst. 253 *b.* That as to the profits, none had been received by the defendants, till after the fine levied; and if they had received any rent, it would be no disseisin, but at the election of the devisee. 1 Inst. 323. 1 Roll. Ab. 659. pl. 12. Hobart, 322. Blunden v. Baugh, Cro. Car. 302. 2 P. Wms. 127.

It was insisted on the other side, that there was no necessity for the defendants' making an entry, in order to substantiate the fine: for that the plaintiffs were never in actual possession, but the defendants had received the rents down to 1740. That the first payment, though not received till February, was due at Christmas; and that the receipt should relate to the time when the money was due. And the continued receipt of rents, together with the fine and non-claim, had barred all the plaintiffs' right, if any such they had.

Lord Hardwicke.—The question is, whether the

fines levied by the defendants, and the non-claim, have barred the plaintiffs. I believe the defendants, at the time of levying the fines, had no particular view to this estate; but yet the fines must have their legal operation. The objection to them on the part of the plaintiffs is, that the defendants were seised of no estate on which the fines could operate, and that, *partes finis nihil habuerunt:* and I am of opinion, that they had not any such estate. No court of equity will make a construction by relation, or fiction of law, to work a wrong. Though I admit that, if the fines do clearly operate in point of law, a court of equity cannot defeat them. Consider then what kind of possession the defendants had of these water shares, which are admitted to be real estate: they had made no actual entry, nor had they received any profits. I think, if they had cut a turf, taken up some of the water, or used the like ceremony, it would not have given them a good seisin: for the same acts that are good, when done by the person who has right, are not sufficient in the case of a wrong-doer; but he ought to have a continuance of possession, without interruption, to gain a seisin: and therefore I think that if the defendants had done any of the acts that have been mentioned, it would not have been sufficient to enable them to levy a fine, so as to operate by disseisin.

It was indeed objected by the defendants that they have received the rents, and that the first payment to them shall have relation to the time when they were due. To this two answers have been given, on the plaintiffs' part: first, that the receipt of rents would not have given them a sufficient seisin to levy a fine. But I am of opinion, that if they had received the rents before levying the fine, it might have been

sufficient. Indeed, in the cases cited, it is said, that a bare receipt of rents shall be a disseisin only at the election of the disseisee; and in Blunden v. Baugh, Cro. Car. 303. it is said, *querendum est a judice quo animo hoc fecerit.* But, in the present case, I think the receipt of the rents, with continuance, and levying a fine, would show *quo animo* the fine was levied; and was so held in Dormer v. Fortescue. So that, if the rents had been received by the defendants, before the fine levied, and continued to be paid to them, I think it would have been the strongest evidence of possession in the defendants. Tit. 36. c. 2.

The second answer given on the plaintiffs' part was, that no rent was received by the defendants till after the fines levied; and this, I think, a full answer: for, till then, there could be no disseisin. The profits were in the hands of the Company at the time of the fines levied; and they must be considered as received by them for the party who had right, and not for a wrong-doer. Nor can the subsequent payment have relation to the receipt before that time: for fictions and relations in law are good to support right, but not to work by wrong. And as to what is said for the defendants, that they made a claim, it falls, I think, under the same distinction: a claim being good to preserve right, but of no effect where the party claiming has no right. I am therefore of opinion, that the fines operate nothing, and that the plaintiffs are clearly entitled to the share they demand.

33. The Court of King's Bench lately determined, that where a fine was levied of Michaelmas Term, relating to the 6th, though, in fact, levied on the 8th of November, it was sufficient evidence of the seisin in fact of the cognizor at the time of the fine Doe v. Spencer, 11 East, 495.

levied; that a writ of possession, after a recovery in ejectment, was executed on his behalf on the evening of the 6th, by the officer's entry on the land, and claiming it for the cognizor; but without any actual change of the tenant in possession, who afterwards paid rent to the cognizor. And Lord Ellenborough said, he should also have thought that a receipt of rent after a fine levied, for a period of time antecedent to the fine, was *prima facie* evidence of the party's possession of the premises, by his tenant, during the period for which the rent was received, unless fraud or contrivance appeared.

34. There are two cases in which a fine is allowed to operate, although the parties have no estate of freehold in the lands. The first is, where a *cestui que trust* levies a fine of his trust estate, of which the reason will be given in a subsequent chapter. And the second is, where a fine is levied by a vouchee to the demandant in a real action; or from a demandant to a vouchee, which is held good: because, in law, the vouchee is supposed to be tenant of the land; though, in fact, he never is so at present.

c. 10.

ante, c. 2. § 43, 4.

Aliens. 13 Vin. Ab. 228.

35. An alien, being incapable of holding lands, ought not to be permitted to levy a fine. But if he does levy a fine, it will not conclude the King, after office found.

Infants. 1 Inst. 131 *a*. 380 *b*. 12 Rep. 123. Hob. 224.

36. An infant is incapable of being cognizor in a fine. But if an infant is permitted to levy a fine, and that fine is not reversed during his minority, it must for ever afterwards stand good *: because the

* In the Rolls of Parliament, 50 Ed. 3. No 127. vol. 2. p. 342. there is a petition from the Commons, complaining of the very great hardship of not permitting a person, who had levied a fine when an infant, to reverse it after he had attained his full age; and

fact of infancy can only be tried by an inspection of his person in open court; *non testium testimonio, non juratorum veredicto, sed judicis inspectione solummodo.*

37. This mode of trial is adopted because all judicial acts shall be intended to have been rightly done, until the contrary appears: it is therefore fitter that the propriety of such an act should be tried by the Court, than by a jury.

38. In cases of this kind, a writ issues to the sheriff, commanding him to constrain the party to appear, that it may be ascertained, by the inspection of his person, whether he be of full age or not. *Ut per aspectum corporis sui constare poterit justiciariis nostris, si prædictus A. sit plenæ ætatis necne.* 9 Rep. 31.

39. The Judges may also examine the infant upon an oath of *voir dire*, or any of his parents; and inform themselves by means of church books, or any other kind of evidence, if there should still remain a doubt, respecting his age. 2 Roll. Ab. 573. pl. 3. &c.

40. The peculiar privilege thus given to infants, of averring against a record during their infancy, is probably owing to this cause. The Judges, or Commissioners, who take the acknowledgement of fines, are supposed to inspect the age of all those who acknowledge a fine before them, pursuant to the directions in the statute *de modo levandi fines;* and if, after such inspection, they are permitted to levy a fine, it

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praying that every person who had levied a fine during his infancy, should be allowed a certain time, such as two years, after he attained his full age, to reverse it; to which the King answered, that he would consider against the next Parliament, whether it would be proper to alter the old law in this point or not.

3 Atk. 711. is presumed they are of sufficient age: and the infant cannot, therefore, in that court, aver his disability. But if, upon a writ of error brought in a superior court, he is inspected, and found not to be of full age, the fine may be reversed: because the public inspection of an infant by the Judges, in a court of record, is of equal notoriety and authenticity with a former record of the infant's having levied a fine, which supposes him to be of full age; and therefore, as both facts are recorded, and contradict one another, the latter fact will prevail.

12 Rep. 122. 41. If the fact of infancy were permitted to be tried by any other mode than the personal inspection of the infant in a court of record, averments might be made many years after a fine had been levied, that the person who acknowledged it was an infant at the time: by which means, records might be avoided by bare averments, which would be productive of the greatest confusion.

1 Inst. 131 *a.* 380 *b.* Keckwith's case, Moo. 844. 42. If the person of an infant be inspected by the Judges, and it is once recorded that he is within age; although the infant should attain his full age, or die before the fine is reversed; yet he, or his heirs, may reverse it at any time afterwards.

Griffith's case, 12 Mod. 444. 43. An infant acknowledged a fine, and the cognizee omitted to get it engrossed, until the infant should attain his full age, in order to prevent him from bringing a writ of error. The Court, upon a view of the cognizance produced by the infant, and upon his prayer to be inspected, and to have his nonage recorded, inspected him, and recorded his infancy, in order to give him the benefit of his writ of error; which he must otherwise have lost, as his nonage determined before the next term.

The principles here laid down respecting fines

levied by infants, are confirmed by the following cases.—Anne Hungate's case, 12 Rep. 122. Warscombe v. Carrell, Id. 124. Dyer, 220. Herbert Parrot's case, 2 Vent. 30. 1 Mod. 246. Hutchinson's case, 3 Lev. 36. Sherlock's case, Sty. 457. Cousin's case, 1 Vent. 69. Requishe v. Requishe, Bulst. p. 2. 320. Poyntz's case, Cro. Jac. 230.

44. By the statute 7 Anne, c. 19. it is enacted, that it shall and may be lawful to and for any person, under the age of twenty-one years, by the direction of the Court of Chancery or Exchequer, on the petition of the persons for whom such infants shall be seised or possessed in trust, to convey and assure any such lands, tenements, or hereditaments in such manner as the said Court shall direct.

Exception. Infant Trustees.

3 Atk. 164.

45. Upon a petition in Chancery, praying that an infant, the heir of a mortgagee in fee, who was likewise a feme covert, might convey by fine, under this statute, the master reporting it necessary,

Ex parte Mair. 3 Atk. 479. Com. Rep. 615.

Lord Hardwicke said, this question came before him soon after he had the seals, and that he consulted with Lord Ch. B. Comyns; who thought the Court might order an infant, who was a feme covert, to levy a fine; for the act was general, that all persons under age should convey and assure; and that as a feme covert of full age could not assure but by fine, the Court might direct an infant to convey in the same manner; and an order was made accordingly.

Vide 3 P. Wms. 387. Lombe v. Lombe, Barnes, 217.

46. By the statute 4 Geo. III. c. 16. it is enacted, that it shall and may be lawful for any infants, having estates in lands, tenements, or hereditaments, within the duchy of Lancaster, or the counties palatine of Chester, Lancaster, and Durham, or in the principality of Wales, by the direction of the Court

of the Duchy Chamber of Lancaster, of the Court of Exchequer in the county palatine of Chester, or of the Court of Chancery of the county palatine of Lancaster, or the Court of Chancery of the county palatine of Durham, and of the several courts of the great sessions in Wales respectively, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said several courts shall direct.

Idiots and Lunatics.

47. Idiots, lunatics, and generally all persons of non-sane memory, are incapable of levying fines; and the statute *de modo levandi fines* expressly directs, that persons of this description shall not be permitted to levy a fine. But still, if the Judges or Commissioners allow them to levy a fine, it can never afterwards be reversed by an averment that the cognizors laboured under any of those disabilities: because the record and judgment of the court, being the highest evidence in the law, the cognizors must be presumed to have been capable of contracting at the time; therefore, no averment can be admitted to the contrary. A declaration of the uses of a fine, by an idiot or lunatic, will also be good at law.

4 Rep. 124.

Tit. 32. c. 12. § 37.

12 Rep. 124.

48. One Henry Bushley, a monstrous and deformed cripple, and idiot, was taken from his guardian, and carried to a place unknown, where he was kept in secret, until he had acknowledged a fine of his lands before Justice Southcot, to one Bothome, and had declared the use of the fine to Bothome and his heirs.

Henry Bushley was afterwards found by inquisition to have been an idiot, *a nativitate*, and upon an action brought by a person who claimed under Bothome, the idiot was sent out of the Court of

Wards upon a man's shoulders, to be shown to the Judges of the Court of Common Peas. Lord Chief Justice Dyer said, that the Judge who took the fine was not worthy to take another: but notwithstanding this, and although the monstrous deformity and idiotcy of Bushley was apparent and visible, yet the fine stood good.

It was moved as a doubt in the Court of Wards, whether this fine should not enure to the use of the idiot and his heirs; for although it was agreed, that the fine, being of record, bound the idiot, yet it was contended, that the deed executed by the idiot was not sufficient to direct the uses of the fine; but it was resolved, "That forasmuch as he was enabled by the fine as to the principal, he should not be disabled to limit the uses, which are but as accessary." 2 Rep. 58 *a.* Hob. 224. Vide infra.

49. One Hugh Lewing, who was an idiot, and so found by office, levied a fine, and declared the uses of it by indenture. It was resolved in the Court of Wards by the Lords Chief Justices Wray and Dyer, that both the fine and declaration of uses should stand good, as neither Hugh Lewing nor his heirs could aver that he was an idiot: and it was said by the Court, that they would sooner suppose the office found to have been erroneous, than bring a judicial act into question, or the judgement of the court in which the fine was levied. Hugh Lewing's Case, 10 Rep. 42. Winch, 106.

50. A complaint was made to the Court of Common Pleas by Thomas Cust, supported by many affidavits, setting forth, that Johanna Lister, one of the cognizors in a fine lately levied, had for some years past been disordered in her senses, and was so at the time when the said fine was levied. The Court thereupon made a rule to show cause why the fine should Lister v. Lister, Barnes, 218

not be vacated; and for John Hancock, one of the commissioners (who, with two others, took the fine by *dedimus potestatem*), to answer the matters in the affidavits. Upon an enlargement of the rule, the court recommended it to them to produce the said Johanna Lister, who resided in Yorkshire, and accordingly she was brought into court: and being examined by the Lord Chief Justice, appeared to be a person of good capacity, and very well to understand the intent of a fine, and the deed declaring the uses thereof, which was in favour of her husband, with whom she had lived many years, and upon whom she was desirous to settle her estate, and prevent its decending to the said Thomas Cust, her nephew and heir at law. The Court discharged the rule, with costs of the application, and the expences of the said Johanna's Journey to Westminster, to be paid by Cust.

Corporations. 51. Corporations aggregate cannot levy fines; because, being invisible bodies, they can only appear by attorney: whereas the statute *de modo levandi fines* requires that the parties to a fine shall appear personally before the Judges. But Lord Coke says, that a sole corporation may acknowledge a fine.

Co. Read, 7.

Who may take by Fine. Touch. 7. 52. With respect to the persons who are capable of being cognizees, and of taking any estate by fine, it will be sufficient to observe, that all those who are enabled by the common law to take by way of grant, may also take an estate by fine; such as infants, married women, corporations sole or aggregate; for an estate may be taken in a fine by attorney; or any other person, except those who are considered in law as civilly dead.

Willion v. Berkeley, Plowd. 237. 53. The King may take lands by fine, because it is a matter of record; and therefore, where the

Marquis of Berkeley levied a fine to certain persons, who granted and rendered to Lord Berkeley, and the heirs male of his body, remainder to King Henry VII. and the heirs male of his body; it was held that the estate was well vested in the King.

TITLE XXXV.

FINE.

CHAP. VI.

Of what Things a Fine may be levied, and by what Descriptions.

1. *Every Species of Real Property.*
7. *New River Shares.*
8. *Tithes.*
9. *But not Money to be laid out in Land.*
10. *By what Descriptions.*

SECTION 1.

Every Species of Real Property. Co. Read. 11. 2 Inst. 513.

A FINE may be levied of every species of real property; such as of an honour, manor, messuage, dovehouse, garden, orchard, land, meadow, pasture, wood, underwood, fishing, chase, warren, fair, toll, waifs, estrays, common, &c. And in general it may be laid down as a certain rule, that a fine may be levied of every thing whereof a *præcipe quod reddat*, or *faciat*, lies.

Idem.

2. There are even some things whereof a fine may be levied, although a *præcipe quod reddat* cannot be brought for them; as an office, for which neither a *præcipe* nor an assize lies, but only a *quod permittat*.

8 Rep. 145 *b.* 1 Wils. R. p. 2. 242.

3. A fine may be levied of an advowson in gross, or right of presentation to an ecclesiastical benefice, of which there are a variety of instances.

Touch. 11. 1 Stra. 106.

4. A fine may be levied of a chief rent, a rent-charge, or any other rent which is actually in *esse*. But a fine cannot be levied of an annuity to a man

and his heirs, because it is only a personal inheritance.

5. A fine may be levied of any thing that lies in prender; provided it can be ascertained with sufficient accuracy: but of things uncertain, such as common without number, a fine cannot be levied. West Symb. § 25.

6. A fine may be levied of an undivided part of a manor, messuage, or other real estate, as well as of the whole; and the writ must be for an undivided moiety, third, or fourth part of a manor, messuage, &c. But if an entire thing, as a manor or messuage, be parted; as if the manor of Dale be divided into two parts; if the division be so made, that the manor of that part be not extinct; and a fine is levied of a part of it, it must pass by the name of the whole; as *de manerio de D. cum pertinentiis.* Moo. 250. 3 Rep. 88. Touch. 12.

7. A fine may be, and is usually levied of New River shares, by the description of so much land covered with water; and whenever a fine is necessary to be levied of such shares, as the New River runs through three counties, Hertford, Middlesex, and London, there must be three several fines, one being necessary for each county. New River Shares. 2 P. Wms. 127. Townsend v. Wyndham, ante, c. 5. § 32.

8. It has been stated that, at the dissolution of the monasteries by Henry VIII. the appropriations of the several rectories, parsonages, and other ecclesiastical benefices which belonged to the religious houses, became vested in the King, who granted them to lay persons. And in order to enable such persons to exercise every act of dominion over their new acquisitions, it was enacted by the statute 32 Hen. VIII. c. 7. § 7. that in all cases, where any person or persons should have any estate or interest in any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit, which Tithes. Tit. 22. § 68-9.

should come into temporal hands and lay uses, they should have the same remedies as for other lands and tenements: "And that writs of covenant and other writs of fines to be levied, and all other assurances to be had, made, or conveyed, of any parsonage, vicarage, portion, pension, or other profit called ecclesiastical or spiritual, as is aforesaid, should be thereafter devised and granted in Chancery, according as had been used for fines to be levied, and assurances to be had or made, or conveyed, of lands, tenements, or other hereditaments; and that all judgments to be given upon any of the said writs original, so to be devised or granted, of or for any of the premises, or any of them, and all fines to be levied and acknowledged in any of the King's said courts thereof, should be of like force and effect in law, to all intents and purposes, as judgments given, and fines levied, of lands, tenements, and hereditaments in the same courts, upon writs original therefore duly pursued and prosecuted; albeit no such form of writs original out of the said Court of Chancery had theretofore proceeded or been awarded."

But not Money to be laid out in Land. Tit. 1. § 6. Tit. 2. c. 2. § 50.

9. We have seen that, in equity, where money is covenanted or directed to be laid out in the purchase of land, such money is considered as land; but still a fine cannot be levied of it, until it is actually invested in land.

By what Descriptions.

10. With respect to the descriptions which are necessary to be used in a writ of covenant, of those things whereof fines are levied, they should be the same as are used in a *præcipe quod reddat*, in an adversary suit. But a fine being now considered as a common assurance, or conveyance by consent, it is construed more favourably than a judgement.

Touch. 11.

11. An honour may pass by the name of a manor,

or by its proper name; as *de honore de T.* or *de manerio de T.* And where a manor is demanded, it is sufficient to describe it by its name and the county wherein it is situated, without mentioning the vill where it lies, for it may be out of any vill, or extend into several vills.

12. Where a manor extends into several vills, as A. B. and C., it is good to express all or none: for if any one of the vills be omitted, no part of the manor situated in that vill will pass; though a fine of the manor, with the appurtenances, would have carried the whole manor. Idem. 13. West Symb. § 27.

13. It was formerly held, that where a fine was levied of a manor, nothing but a real manor would pass, and not a reputed manor. But it has long since been agreed, that a manor in reputation only will pass in a fine by the word manor; and that when a fine is levied of a manor, with its appurtenances, lands, reputed to be parcel of the manor, will pass. Mallet v. Mallet, Cro. Eliz. 524. 707. Sir M. Finch's case. 6 Rep. 63.

14. Parsonages, rectories, vicarages, or tithes impropriate, do not pass by the words, the advowson of the church of S. but by the words, the rectory of the church of S.; with the appurtenances. For the word rectory comprehends the parish church with all its rights, glebes, tithes, and other profits whatsoever. But where a fine is levied of a right of presentation to a church only, the words are, of the advowson of the church of S. and not with the appurtenances. And where a fine is levied of a vicarage endowed, the writ must be, of the advowson of the vicarage of S. and not with the appurtenances. And where there is no vicarage endowed, it must pass under the words, the advowson of the church of S. Touch. 12. Tit. 22. § 70. Touch. 12.

15. Land ought to be demanded by the certain measure of its quantity, according to the usual mode Idem.

by which it is measured; as an acre, oxgang, hide, rood, &c.; and by the names which are usually given to the different kinds of land; as arable, meadow, pasture, &c.

Waddy v. Newton, 8 Mod. 276.

16. Where a fine was levied of a certain number of acres of land, it became a question whether the acres were to be considered as customary acres, or according to the statute *de terris mensurandis*; nor does it appear how the case was determined. But Lord Coke mentions a case where it was adjudged, that in a common recovery of a certain number of acres of land, they should be estimated according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*.

Bruyn's Case, 6 Rep. 67 *a*.

Tit. 32. c. 20. § 34.

17. The particular vill or hamlet, town, hundred and county, in which the lands lie, ought to be mentioned in the fine. And where a fine was intended to be levied of lands lying in two vills, and one of the vills only was mentioned in the writ, it was held, that the lands lying in the other vill did not pass.

Stork v. Fox, Cro. Ja. 120.

18. Upon a special verdict it appeared, that there were two vills, Walton and Street, in the parish of Street. A fine was levied of certain lands in Street; and whether the lands in Walton passed by that fine, was the question.

It was adjudged that they did not pass; for Street being a distinct vill, and so found by the verdict, although the parish of Street comprehended them both, yet the lands in Walton were not comprised in the fine. But if the fine had been levied generally of lands in the parish of Street, then all had well passed.

19. If a fine be levied of lands in A., and the party has also lands in B., yet if the constable of A. is also constable of B., all the lands shall pass; for in such cases both places constitute the same vill.

20. Upon a special verdict it appeared, that a fine had been levied of all the cognizor's land in A., and that he had lands in B.; that a tithingman was appointed in B., but that the constables of A. exercised their authority, not only in A., but also in B. Waldron v. Roscarriot, 1 Mod. 78. 1 Vent. 170.

Lord Holt said, one parish might contain three vills. The parish of A. may contain the vills of A. B. and C.; that is, where there were distinct constables in every one of them. But if the constable of A. ran through the whole, then was the whole but one vill in law; or where there was a tithingman, it might be a vill; but if the constable ran through the tithing, then it was all one vill. He knew where 3 or 4,000*l.* a year had been enjoyed by a fine levied of land in the vill of A., in which were five several hamlets, in which were tithings, but the constable of A. ran through them all; and upon that, it was held good for all. There was a case of the constable of Blandford Forum, wherein it was held, that if he had a concurrent jurisdiction with all the rest of the constables, the fine would have passed the lands in all. In some places they had tithingmen, and no constables.

21. A fine may be levied of a close or messuage by a known name, without any mention of the vill or hamlet in which it lies.

22. In trespass, the question was, whether a fine might be levied of a close, by a known name, in a vill, without any mention of the vill or hamlet in which it lay. Monck v. Butler, Cro. Ja. 574.

It was adjudged, that the fine was good enough; for it was but the agreement of the parties, which being recorded, although there was neither vill nor hamlet mentioned wherein it lay, it was good. And notwithstanding it was objected, that a *pracipe* ought

to be in a village or hamlet, or place known out of a village or hamlet, as appeared by all pleadings; for if the place known was within a vill or a hamlet, the *præcipe* ought to be brought accordingly; yet it was answered, that this was true in a *præcipe* or other writ to which the defendant was to answer; but this being but a concord and agreement of the parties, and no exception taken, but the fine drawn and passed, it was good.

Faveley v. Easton, Cro. Car. 269. 276.

23. It was found by special verdict, that John Easton, being tenant in tail of a certain messuage and lands called Easton's, lying in Bishop's Morchard, levied a fine thereof, by the name of a messuage and 200 acres of land; 50 acres, &c. in Essington, Easton, and Chilford; and that there was not any vill or hamlet or place known by the name of the messuage or tenement called Easton's, out of the vills or hamlets; and that none of the said tenements were in Essington or Chilford.

The question was, whether, upon this matter found, a fine levied of lands in places known in a vill, not mentioning the vill or hamlet where the lands are, was good.

All the Judges were of opinion that the fine was good; because, being but an assurance, it was to be taken favourably.

Stud v. Courtenay, 1 Leon. 188.

24. The word tenement is not a sufficient description of any thing whereof a fine is levied; for a tenement may consist of a messuage, land, or any other thing which lies in tenure. And there is an instance where a fine, levied of two tenements, was reversed by writ of error.

Vide Tit. 32. c. 19. § 51. Gilb. Ev. 38. 6 Mod. 235.

25. In the case of an *ambiguitas latens* in the description of the things whereof a fine is levied, an averment is admitted to explain it. Thus if a person

has two manors, which are both known by the name of Dale, and he levies a fine of the manor of Dale generally, circumstances may be given in evidence to prove which manor was intended to pass by the fine.

26. A fine does not ascertain but only comprises the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses, in order that the precise lands comprehended in the fine, and intended to pass by it, may be ascertained. Tit. 32. c. 12. § 8.

27. There are frequent instances of tenants in fee simple, who, in levying fines, insert more parcels of land than do actually belong to them; in which case Lord Hardwicke says, a court of equity will restrain the operation of the fine to such lands as do really belong to the parties. 2 Atk. 241. 1 Ves. Jun. 138.

TITLE XXXV.

FINE.

CHAP. VII.

Of the Amendment of Fines.

2. *Original Writ.*
7. *Entry of the King's Silver.*
9. *The Proclamations.*
13. *Description of the Lands.*
24. *Names of the Parties not amended.*
27. *A Fine of one Term will not be altered to another.*

SECTION 1.

FINES being now considered as common assurances, made with the consent of the parties, the Court of Common Pleas, upon the authority of the statute 8 Hen. VI. c. 12., by which the Judges are authorized to reform and amend all misprisions of clerks in records, has frequently permitted fines to be amended; where any palpable mistake or misprision has been made by the officers of the Court, in the entry of the King's silver, the proclamations, or the description of the lands.

Original Writ.

2. The Judges have, in some instances, even directed the original writ, upon which a fine has been levied, to be amended. But the propriety of such amendment seems, from some modern determinations, to be extremely doubtful.

Gage's Case, 5 Rep. 45 *b.*

3. A writ of error was brought to reverse a fine, and the error assigned was, that the writ of covenant bore *teste* the 24th of April, returnable *quind. pasch.* which was the 14th of April, so that the return was before the *teste*.

It was resolved by the whole Court, that the writ should be amended, because fines were nothing more than common assurances, entered into with the mutual consent of the parties. This case is however said to be totally misreported; and the doctrine there laid down, that an original writ may be amended, has been contradicted by the following determination.

4. Lord Pembroke petitioned the House of Lords for a bill to set aside an amendment made in a fine, levied in the Court of Great Sessions in Wales. Pembroke v. Jefferies, 1 Salk. 52. Holt 59.

It was referred to the Judges whether the fine was amendable in those particulars, in which it had been amended; and whether such amendments were warranted by law. One of the amendments was in the original writ, which had been tested six months after the *dedimus* for the caption.

Lord Holt certified the opinion of the Judges to be, that the writ of covenant, being an original writ, was not amendable, either by the common law, or by any statute. That neither the 14 Edw. III. nor the 8 Hen. VI. warranted such an amendment. That as to this purpose there was no difference between adversary actions and amicable ones; for no court could amend a mistake in a deed, which was as much a common assurance as a fine; and that Gage's case was misreported, and was not law. Cooke v. — 4 Taunt. 644.

5. In Lord Raymond's Reports, it is said by Mr. Justice Powell, that the *teste* of an original writ was not amendable; that it was so resolved by the House of Lords, with the concurrent opinion of all the Judges, upon consideration of Gage's case, in the case of Lord Jefferies; and a judgement given in Wales upon the authority of that case, was reversed; and upon that occasion the record of Gage's case was searched for, and found not to warrant the report. And Lord Holt vol. 2. 1066.

Gill v. Yeates, 4 Taunt. 708.

said, the record of Gage's case was in Coke's Entries, tit. Error, p. 9. 250., where the judgment of the Court was contrary to the report; for the writ was not amended, but the fine reversed.

Lindsay v. Gray, 2 Black. R. 1013.

6. In a late case the Court of Common Pleas refused to amend the return of a writ of covenant, on which a fine had been levied; because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir W. Blackstone observes, that the Court gave no opinion as to the propriety of such an amendment, in a fair case.

Vide Cross v. Grey, Tit. 36. c. 6.

Entry of the King's Silver.

7. A mistake in the entry of the King's silver will be allowed to be amended.

Bohun's Case, 5 Rep. 43.

8. Husband and wife being seised of the manor of Empoles, levied a fine thereof, by the name of the manor of Empoles, and of a great number of acres of land, meadow, &c. according to the common form of fines; and the manor and tenements were valued at 20 marks *per annum*, so that the fine in the hanaper was 1*l.* 6*s.* 8*d.*, and therefore the King's silver, or post-fine, amounted to 40 shillings.

The clerk made the entry of the King's silver in this form:—*Nich. Bohun dat dominæ reginæ* 40*s. pro licentia concordandi, &c. in placito conventionis* of so many acres of land, meadow, &c. omitting the manor; and error being assigned on this point, because the King's silver was not mentioned to be paid as well for the manor as for the other tenements, it was resolved by all the Judges, that the roll of the entry of the King's silver should be amended, according to the writ of covenant, the note, the foot, and the certificate of the Judges, in these words—*De manerio de Empoles cum pertinentiis ac, &c.* which were omitted through the negligence of the clerk; for it appeared that the whole sum was

paid, as well for the manor, as for the residue of the tenements, so that no prejudice was done to the Queen.

9. The proclamations in a fine may also be amended, even after a writ of error has been brought, in which a defect in the proclamations is assigned for error. The Proclamations.

10. Thus the proclamations which were endorsed on the foot of a fine, were, pending a writ of error, allowed to be amended, according to the proclamations on the note of the fine, remaining with the chirographer. And in another case, the proclamations of a fine were allowed to be amended, after a writ of error had been brought, in which that circumstance was assigned for error. Dowling's Case, 5 Rep. 44. Down's Case, Idem.

11. So where a mistake had been made in the third proclamation, on the foot of the fine, and the fourth proclamation was altogether left out. But it appearing that the proclamations upon the record remaining with the chirographer, and in the book of the chirographer, were properly made; it was adjudged that the errors in the proclamations should be amended. Pettus v. Godsalve, 13 Rep. 54.

12. In the same manner where a fine was levied in Mich. 11 Eliz. and the proclamations indorsed by the chirographer were right; but in the note of the fine delivered to the *custos brevium*, the second proclamation appeared to have been made on the 20th May, where it should have been the 23d May. The Court held that it should be amended; for the engrossment upon the fine, by the chirographer, was the foundation, which, being right, was a sufficient warrant to amend the other; though the Court held it a good fine, without any amendment. Strilley's Case, Hut. 122.

13. The description of the lands intended to be comprised in a fine, is frequently erroneous; but in such cases, whenever the description is contrary to Description of the Lands.

the intention of the parties, it will be amended; provided such intention appear from the deed to lead the uses of such fine, or from any other sufficient circumstances.

1 Ld. Raym. 209.

14. Serjeant Pemberton moved to amend a fine which was levied of the manor of Ighfield, where the deed which declared the uses was of the manor of Ightfield, which was the true name. And it was amended accordingly.

Tregare v. Gennys, Pig. 218.

15. It appeared to the Court, after the examination of the plaintiff and deforciant, the inspection of a fine levied between the parties, and the deed declaring the uses of the fine; that by the omission or misprision of the clerk, who made and engrossed the *præcipe* and concord of the fine, he supposed the lands to lie among others in the parish of Lanceston, when in fact there was no such parish in the whole county of Cornwall, but that it ought to have been, in the parish of St. Stephen's near Lanceston.

It was ordered by the Court, that as well the *præcipe* and writ of covenant, as all entries and records of the said fine, should be amended and rectified, by inserting the words *St. Stephen's near*, as by law it ought to be done.

Walker v. Okenden, Cases of Pract. 52.

16. So where a motion was made to amend a fine, by inserting the word *Woorth*; and on showing cause the rule was made absolute for the amendment; although it was objected that the heirs at law would be prejudiced by the amendment. But the Court said, they could not take notice whether it would be prejudicial to the heir at law or not; as it was the duty of the Court to make the fine agreeable to the deed of uses, and to the intention of the parties.

Foster v. Pollington, Barnes, 216.

17. Two fines of land in the island of Antigua were ordered to be amended, upon hearing counsel

for the cognizee, and the heirs at law of the cognizors, who had brought writs of error to reverse the fines. The lands were described in the writs, &c. thus:—*In insula de Antigua in America, in partibus transmarinis*, viz. *in parochia Sanctæ Mariæ Islington in com. Middlesex.* The amendment was by striking out the words, *in America in partibus transmarinis.*

Articles of agreement between the parties to the fines, to convey and assure the lands in the island of Antigua, were read: and, *per curiam*, the repugnancy inserted merely through want of skill, and which would vitiate the fines, must be rejected, and the fines made effectual, that is, in common form; if they be then insufficient, advantage may be taken thereof.

18. A fine levied in 1 Geo. I. was ordered to be amended according to the deed of uses, by striking out the word *parochia*, and inserting the word *parochiis*; and also by inserting the words *et Melmerby*. Craghill v. Pattison, Barnes, 24. Manley v. Tattershall, 4 Taunt. 257.

19. It was moved that a fine of lands, levied in the reign of Queen Anne, might be amended by a deed of marriage settlement, on the behalf of one John Smith, tenant in tail under that settlement, by altering the name of a parish in the fine, from Coxley to Corley. Upon reading the deed, the indenture of the fine, and an affidavit that there was no such parish as Coxley in the county where the lands were; the Court ordered the fine to be amended, without making any rule upon any person to show cause. Lambe v. Reaston, 5 Taunt. 207. Bohoun v. Burton, 3 Wils. R. 58.

20. Where one of the deeds to lead the uses of a fine, namely, the lease for a year, contained the word tithes, but the deed of release omitted that word; the Court refused to amend the writ of entry, by inserting the word tithes, though the release had the words, hereditaments and appurtenances whatsoever: Phillips v. Jones, 3 Bos. & Pul. 362.

and observed, that the release did not convey all the hereditaments described in the lease, but only the hereditaments belonging to the messuages and lands before described in the release itself; and that tithes were not hereditaments belonging to land, but were a separate subject of tenure, and must be held by a different title.

Clutterbuck v. Brabant, 1 Marsh, 406.

Cent. 6. Ca. 45.

21. It is laid down by Jenkins that more acres of land do not pass by a fine, than the fine mentions, although the indenture that leads the use of it mentions more acres than are in the fine; for the fine is the foundation of the estate, and the estate ought to rise out of it.

22. This doctrine appears to be now changed, for the number of acres in the fine will be altered in conformity to the deed of uses, which is the measure by which juries usually go in ascertaining the description of the estates whereof a fine is levied. But where the deed of uses is general, the Court will not allow the number of acres inserted in a fine to be increased.

Eyton v. Eyton, 4 Bro. Parl. Ca. 149.

Powell v. Peach, 2 Black. R. 1202.

23. On a motion to amend a fine by increasing the number of acres, the deed of uses being general, and the intent only proved by affidavit;

Lord Ch. J. De Grey observed, that amendments anciently were only of errors in the process of fines, or mistakes in the description of the premises; and these were amended by other parts of the same record: but the amendment then required varied the extent of the premises from 50 to 84 acres. This indeed might be done upon principle, provided it was intended by the parties; but what was the evidence of that intent: the deed to lead the uses could not be legal evidence of the wife's intent, because she

was not examined as to the deed, as she was to the fine; and so there was nothing to amend by.

Sir W. Blackstone thought the deed of uses sufficient evidence of the intention of the parties, and that it had always been allowed as such, even in the case of femes covert; Luggins v. Rawlins, Barnes. But what did the deed of uses say: it described no number of acres; that was to be proved by *viva voce* evidence, which was too dangerous. He could find no precedent where the quantity or number of acres had been increased, much less nearly doubled, as in this case; and was not for making a precedent, which would give such an inlet to fraud.

Bartram v. Towne, 1 Marsh. 446.

24. An error in the names of the parties will not in general be allowed to be amended.

Names of the Parties not amended.

25. On a motion to alter the name of the plaintiff in a fine from Robert to John; on an affidavit by the attorney concerned, that John Dixon was the party meant, who had purchased a part of the estate, and that no deed to declare the uses of this fine had then been executed. The Court thought that this was equivalent to a new fine; and refused the motion.

Dixon v. Lawson, 2 Black. R. 816.

26. A motion was made to amend a fine, by altering the surnames of the deforciants in the writs of covenant and *dedimus potestatem*, and in the *præcipe* and concord acknowledged by them, and at the several offices through which they had passed, from Wood to Motley; and that the chirographer should be ordered to deliver up such writs, &c. for the above purpose. An affidavit was produced of the attorney who was employed to pass the fine three years before, and of the deforciants themselves; the former of whom stated, that at the time he was employed to pass the fine, and through the whole of the transac-

Ex parte Motley, 2 Bos. & Pul. 455.

tion, he understood the names of the deforciants to be Wood, and accordingly inserted that name instead of Motley, which he then found to be their real names, in the writ of covenant; and that they, being illiterate persons, only put their mark, and did not discover the mistake. The deforciants stated that the fine was read over to them, and they understood it, but did not discover the mistake which had been made with respect to their names.

Lord Alvanley said, this was an application to amend a fine, by inserting the names of Motley and wife, instead of Wood and wife. It was not sworn that the parties at the time the fine was passed were as well known by one name as the other, or even that they were known by the name of Wood at all; and the Court was desired to make the amendment, without any reason given, why one name was put for the other. The consequences of such an amendment must be obvious to every body. Suppose an ejectment brought, and a search made for a fine and none found, and then, when the parties came to trial, a fine is produced, which escaped the search because the name had been changed. These amendments ought not to be made, except in cases where the alteration was of such a nature as that no one could be misled by it. He would go farther and say, that if the Court of Common Pleas had allowed such an amendment as was then applied for, he, as Master of the Rolls, would not have granted a new writ of covenant.

Ex parte Motley, 2 Bos. & Pul. 455.

The other Judges concurred, and the motion was refused.

Vide Tit. 36. Recovery, c. 9.

A Fine of one Term will not be altered to another.

27. Although the Court of Common Pleas will amend a fine, in matters of form, yet where a fine

is recorded of one term, that Court will not alter it, and make it a fine of another term.

28. A fine was taken on the 1st October 1770, 10 Geo. III. and acknowledged before commissioners, in which Sir J. Eardly Wilmot, then Lord Ch. J. of the Court of Common Pleas, and others, were cognizors, which was passed, engrossed, and recorded as a fine of the preceding Trinity term. Sir J. E. Wilmot had nothing in the lands, until a few days before he acknowledged the fine; and therefore in the deed to lead the uses thereof, it was covenanted by the parties, that the fine should be levied as of the Michaelmas term next ensuing the acknowledgement thereof; but by mistake the fine was recorded as of the preceding Trinity term.

Heath v. Wilmot, 2 Black. R. 778. Wilson on Fines, 78.

Upon producing the deed to lead the uses of the fine, and showing the mistake, it was moved that the fine might be altered, and made a fine of Michaelmas term, according to the covenant in the deed of uses; but Lord Ch. J. De Grey, and the whole court observed, that this was not a motion to amend a fine, but to make a new fine: for Sir J. Wilmot having nothing in the lands at the time when the fine was levied and recorded, it could only operate as a bar to himself, and those claiming under him; so that the granting of this motion might prejudice the rights of strangers.

The motion was refused.

TITLE XXXV.

FINE.

CHAP. VIII.

Effect of Fines at Common Law, and by the Statutes 18 Edw. I. 27 Edw. I. and 34 Edw. III..

2. *Force of a Fine at Common Law.*
9. *Of the Statute De modo levandi fines.*
13. *Of the Statute De finibus levatis.*
17. *Of the Statute of Non-claim.*

SECTION 1.

HAVING stated the various circumstances which are necessary to the levying a fine, I shall now proceed to investigate the effects with which it is attended.

Force of a Fine at common Law.

2. By the common law all judgements of courts were allowed the utmost force in determining the rights of the contending parties; now a fine being considered as a composition of a suit actually commenced, and the concord of a fine coming in lieu of the sentence which would have been given in case the parties had not agreed to terminate the suit in that manner, it was allowed to have the same force and effect as a judgement in a real action.

3. This idea seems also to have been adopted from the civil law; for it is said in Justinian's Code—*Non minorem auctoritatem transactionum quam rerum judicatorum esse recta ratione plàcuit.* And the rule laid down by modern civilians is—*Transactio inter ipsos transingentes eandem vim habet quam res judicata*;

Cod. lib. 2. tit. 4. l. 20.

Vin. de Trans. c. 8. n. 3,

et propterea, causa transactione decisa et finita, non magis quam sententia retractatur; nec alioqui nullus sit litium finis.

4. The delivery of possession by the sheriff, after a fine was levied in pursuance of the writ of *habere facias seisinam*, which issued for that purpose, being equal in point of notoriety to the ceremony of livery of seisin, it was therefore established, that a fine not only transferred the possession, but also the right of possession. It does not, however, take away the right of entry of those who have a title to the land, except in some particular cases, which will be noticed hereafter.

5. A final judgement in a writ of right, and a chirograph of a fine, were originally considered as perfect bars to all claims whatever, from the moment they were completed. Thus Madox has transcribed a record of 10 Rich. I. where Roger de Wermedale was impleaded for lands, of which a fine had been levied; and it was adjudged that he should hold the lands in peace; and that none of the said persons could rightfully implead him, as they were in *patria* when the fine was levied, and made no claim. Formul. Diss. 14, 15.

Recordatum est per eosdem barones quod post finem et concordiam factam inter prædictos Matildam et Rogerum, &c. traxerunt prædictum Rogerum in placitum de tenemento quod annotatur in rotulo precedente. Et quod judicium fuit, quod Rogerus teneat in pace tenementum prædictum, sicut continetur in cyrographo facto inter ipsum et prædictum Matildam; et quod nullus prædictorum poterit eum implacitare, ex quod ipsi fuerunt in patria quando finis ille factus fuit, et non posuerunt clameum aliquod in terra illa, sicut prædictus

Rogerus contra eos dixit in curia regis in placito, et ipsi hoc non defenderunt.

6. The effect of a judgement or fine continued to be the same when Bracton wrote, and he justifies it upon the principle that sufficient time was given, both in a real action, and the passing a *chirographum*, for all those who had any right to make their claim.

Bract. 436 a. *Et sciendum quod statim in ipso placito et factione cyrographi, vel ante judicium, si presens fuerit in curia, vel si in patria, vel in regno, infra quatuor maria, nec allegare poterit ignorantiam, nisi justum intervenerit impedimentum, nec ulterius audiri debet (ut videtur) quia terminum habet ad minus unius mensis (secundum communem provisionem regni) infra quem venire potest commode post placitum motum, quocunque fuerit in regno, infra quatuor maria; quia quilibet implacitatus debet habere summonitionem* 15 *dierum ad minus, quæ rationabilis dici poterit summonitio: nec conceditur alicui cyrographum primo die litigii, sed habebit alium diem per spatium* 15 *dierum ad minus ad capiendum cyrographum suum, ut infra totum illud tempus possit que jus habuerit, opponere clameum suum.*

7. A considerable alteration was however made in this respect some time in the latter end of the reign of Hen. III. or the beginning of that of Edw. I. For in the time of this latter prince, all persons were allowed a year and a day to claim against a judge-

Lib. 6. c. 53. ment or fine. Thus Fleta says—*Excipere enim poterit tenens ex taciturnitate petentis, vel alicujus antecessoris sui, ut si subticuerint cum viderint de jure suo litigare, vel finalem concordiam facere, et clameum suum infra annum et diem non apposuerint.*

But if no claim was made within that period, a fine then became a perpetual bar to all persons what-

ever; so that a fine was a mode of acquiring lands, which after a certain time secured the title of the purchaser against every kind of claim.

8. The necessity of some kind of assurance of this nature seems to have been very early felt; for it is a maxim of the highest antiquity in our law, that all sales of personal property, in an open fair or market, are not only good and valid between the contracting parties, but are also binding on all strangers who have any right to the things thus sold. And Lord Coke, and the author of Doctor and Student, were of opinion that the validity of a sale in an open market, and its efficacy in binding the rights of strangers, was extended to a fine, for the security of those who were in possession of lands.* 2 Inst. 713. Co. Read. 1. Doct. & Stud. Dial. 1. c. 23.

9. The utility of fines, and the propriety of allowing them the utmost force in securing landed property, produced the statute 18 Edw. I. st. 4. usually called the statute *De modo levandi fines*; which was made for the sole purpose of ascertaining the manner in which fines should in future be levied, and of declaring their effect. This statute, after regulating the forms which were to be pursued in the passing of fines, proceeds thus:—" And the cause wherefore Of the Statute De modo levandi fines.

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* The law hath ordained the Court of Common Pleas as a market overt for assurances of land by fine; so that he who will be assured of his land, not only against the seller, but all strangers, it is good for him to pass it in this market overt by fine. 3 Rep. 78 *b*. For as the common law hath provided a sure and safe way to acquire and get the property of goods by sale in market overt, so also the common law hath ordained a sure manner of conveyance for the purchaser of lands, which, as our statute saith, was by fine. Co. Read. 1.

such solemnity ought to be observed in levying a fine is, because a fine is so high a bar, and of so great a force, and of so strong a nature in itself, that it concluded not only such as are parties and privies thereto, and their heirs, but all other persons in the world, being of full age, out of prison, good memory, and within the four seas, the day of the fine levied; if they make not their claim of their action within a year and a day, on the foot of the fine."

Rot. Parl. 19 Edw. I. No. 1. vol. 1. p. 66.

10. In the next year after this statute was made, there is a very strong instance of the same principle to be found in the Rolls of Parliament. The King having seised on the manor of Sobbirs, for his year, day, and waste, on account of a felony committed by Thomas de Weyland, Margery the wife of the said Thomas, and Richard his son, petitioned the King to be immediately restored to the manor; because they had been enfeoffed jointly with the said Thomas for their lives, as well by a charter as by a fine levied in the King's Court, which they produced; and as Thomas de Weyland was only seised for life, they contended that the King was not entitled to the year, day, and waste, nor the lord of the fee to a forfeiture. This case was solemnly discussed in Parliament, where it was determined, that in consequence of the fine, the manor was not forfeited; and in this judgement is the following remarkable passage: *Nec in regno isto provideatur, vel sit aliqua securitas, major, seu solemnior, per quam aliquis vel aliquid statum certiorem habere possit, vel ad statum suum verificandum aliquod solemnius testimonium producere, quam finem in curia domini regis levatum, qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, & hac de causa providebatur.*

2 Inst. 511.

11. The principles of natural justice require that those who are disabled from pursuing their rights, should not be bound by their non-claim; and therefore all those who were under the age of 21 years, in prison, of nonsane memory, or beyond the four seas, when a fine was levied, were excused from making their claim, both by the common law, and by this statute: and no particular time being prescribed to them for pursuing their rights, they were not obliged to make their claim within a year and a day after the removal of their disabilities, but were allowed to prosecute it at any subsequent period.

Bract. 436 *b.* 2 Inst. 516. Plowd. 360.

12. By the old law, married women were not bound to make any claim during their coverture:—*Item excusatur uxor quæ sub potestate viri supposita, quod clameum non apposuerit, licet mittere possit.* But no saving or exception was made in this statute for married women, because their husbands were always supposed to be capable of claiming for them. However, if the husband were within age at the time when a fine was levied, although the wife was of full age, still the infancy of the husband, whose province it was to make the claim, saved the right of the wife for ever.

Bract. 436 *b.* 1 Inst. 260 *b.* Plowd. 360.

13. In the case of a recovery in a writ of right, or fine executory, the recovery and fine must have been executed, and the possession delivered to the recoveror or cognizee, otherwise they were no bar whatever; because, until there was a transmutation of possession, strangers were not presumed to have any notice of the alteration of property, and therefore were not obliged to put in their claim.

Of the Statute De finibus levatis.

Co. Read. 14. 2 Inst. 522. Plowd. 359.

Co. Read. 18. 2 Inst. 522.

14. This rule gave rise to a great number of suits by the maintenance of the nobility and great barons during the insurrections and civil wars which happened in the reign of Hen. III. Averments that there was no transmutation of possession were frequently made against fines; and were usually allowed in the two following cases. First, where a person seised in fee levied a fine to a stranger, *sur cognizance de droit come ceo, &c.* and the cognizee granted and rendered back the same lands to the cognizor in tail, or for years: and secondly, where a tenant in tail accepted a fine from a person who had nothing in the lands. In these cases the heirs of the cognizor who were prejudiced by such fine, were allowed to avoid them by an averment, that there was no transmutation of possession.

15. To remedy this inconvenience, a statute was made in 27 Edw. I. called the statute *De finibus levatis*, enacting that such averments should not thenceforth be admitted.

16. This statute also directed, that the note of every fine should be read in the Court of Common Pleas on two certain days in the week; and that during such reading, all pleas should cease.

Of the Statute of Non-claim.

17. It has been stated, that by the statute *De modo levandi fines*, all those who had any right to lands, whereof a fine was levied, were obliged to make their claim within a year and a day after the fine was passed; unless they laboured under some one of the disabilities specified in that act. And it was determined, that in the case of a tenant for life, remainder for life, remainder in fee, if the first tenant for life had aliened his estate, and the alienee had levied a fine, the remainder-man for life might enter, and avoid the

Plowd. 357. 359. 1 Inst. 254. 262. 2 Inst. 51.

fine, both as to himself, and as to the remainder-man in fee: but if the person next in remainder neglected to enter within the year and day, not only he, but also the remainder-man in fee, were for ever barred; and a claim by the remainder-man, within the year and day, would not have saved his right; by which means the estates of remainder-men and reversioners were frequently barred, by the neglect of the particular tenants.

18. This was certainly a very great grievance, and was so severely felt, that to remedy it the statute of nonclaim, 34 Edw. III. c. 16. was passed; enacting, "that the plea of nonclaim of fines, which from thenceforth should be levied, should not be taken nor holden for any bar in time to come."

19. This statute was made in consequence of a petition from the Commons, which is published in the Rolls of Parliament, 17 Edw. III. No. 26.—*Item que noncleyme des fines levees sur le rendre en temps a venir ne barre nul home de sa action.* To which the King answered—*It plest au Roi q'desore cest chose soit fait, et q'estatut ent soit fait p'avis des grantz et autres de son conseil.* Vol. 2. 142.

20. The efficacy of fines was entirely destroyed by this statute; and strangers were thereby allowed to claim lands at any indefinite period of time, after a fine had been levied of them; which must have been productive of very great inconveniences.

21. The statute of nonclaim is still in force with respect to fines that are levied without proclamations. And although such fines are no bar to the issue in tail, yet when levied by a tenant in tail in possession, they operate as a discontinuance, and of course put the remainder-men or reversioner to their forme- Tit. 2. c. 2. § 6.

Co. Read. 18.
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TITLE XXXV.

FINE.

CHAP. IX.

Effect of Fines by the Statutes 1 Rich. III. 4 Hen. VII. and 32 Hen. VIII. in barring Estates Tail.

2. *Of the Statute 1 Rich. III.*
3. *Of the Statute 4 Hen. VII.*
8. *Of the Statute 32 Hen. VIII.*
9. *Effect of these Statutes in barring Estates Tail.*
26. *The Tenant in Tail need not be in Possession.*
34. *A Possibility of an Estate Tail sometimes barrable.*
40. *An Estate Tail in a Rent Charge is barrable.*
42. *And in an Advowson.*
43. *And in a Trust Estate.*
44. *A Fine bars the Issue in Tail before Proclamations.*
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SECTION 1.

IT has been a constant remark of those who have had occasion to trace the history of our English jurisprudence, that whenever a material alteration has been made in the common law, the inconveniences arising from such change have been much greater than those which were intended to be remedied.

Of the Statute 1 Rich. III.

2. This observation was perhaps more fully exemplified by the consequences which attended the statute of non-claim, than by any other innovation which has been attempted in the common law. On this subject it is difficult to add any thing to Lord Coke's

2 Inst. 518. expression—" Great contentions arose, and few men were sure of their possessions." And it is astonishing that the legislature should suffer a grievance which must have been so universally felt, to continue so long; for the common law respecting non-claim was not revived till the first year of the reign of Rich. III., who seems to have endeavoured to palliate his cruelties, and the usurpation of the Crown, by the many excellent laws which he immediately enacted; one of those was the stat. 1 Rich. III. c. 7., by which the common law was restored, and the doctrine of non-claim revived.

Of the Statute 4 Hen. VII.

3. This act was soon followed by the stat. 4 Hen. VII.,; and as in this last law all the clauses in 1 Rich. III. are copied almost *verbatim*, and some additional matters are subjoined, the statute 1 Rich. III. is now become obsolete; and the effect of fines depends almost entirely, at this day, on the stat. 4 Hen. VII., for which reason it will be necessary to examine it at large.

4. This act, after reciting the last clause in the statute *De finibus levatis*, proceeds thus:—" The King our Sovereign Lord considereth that fines ought to be of the greatest strength, to avoid strifes and debates, and to be a final end and conclusion; and of such effect were taken, afore a statute made of non-claim, and now is used to the contrary, to the universal trouble of the King's subjects; will therefore it be ordained, &c."

c. 2. § 78. The first section, which directs the proclamations to be made, has been already stated.

5. The second section of the act is in these words: " And the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same; except women covert, other

than be parties to the said fine, and every person then being within age of twenty-one years, in prison, or out of this realm, or not of whole mind, at the time of the said fine levied, not parties to such fine."

6. We have seen that by the common law a fine levied of an estate tail only operated as a discontinuance of it, and did not bar the issue from bringing their formedon. But in consequence of some ambiguous expressions in this statute, it was supposed to enable tenants in tail to bar their issue by fine: estates tail had however continued so long, and were so much favoured by the nobility, on account of their not being forfeitable for treason, that the Judges were extremely cautious of putting so extensive a construction on it, especially as the statute *De donis conditionalibus* had expressly declared that a fine levied of an estate tail should be void. ante, c. 8. § 4.

7. A case however arose in 19 Hen. VIII. in which this point came in question, before all the Judges in Serjeants' Inn. A tenant in tail levied a fine, and five years passed in his lifetime; upon his death a question arose, whether his issue should be barred by the fine. Bro. Ab. tit. Fine, pl. 1. Dyer, 3 *a.* 1 Inst. 121 *a.* n. 1.

Englefield, Shelley, and Conings by contended that the issue was not barred, because he was neither privy nor party to the fine; for he claimed the land from the donor, and not from the donee, although he must convey himself to the land by the father. On the other side, Fitzjames, Brudenell, Fitzherbert, Brooke, and Moore were of opinion that the issue was barred; for the intention of the makers of the statute was that a fine should be a final end, and conclude as well privies as strangers; and that the third saving only extended to strangers, and not to privies.

Of the Statute 32 Hen. VIII. c. 36.

8. This determination appears not to have been entirely approved of; for in 32 Hen. VIII. a statute was made, reciting that doubts had arisen respecting the validity of the statute 4 Hen. VII. in barring the issue in tail, and enacting, (§ 1.) "that all and singular fines, as well heretofore levied as hereafter to be levied, with proclamations according to the statute, by any person or persons of full age of one and twenty years, of any manors, lands, tenements, or hereditaments before the time of the said fine levied in anywise entailed to the person or persons so levying the said fine, or to any of the ancestors of the same person or persons, in possession, reversion, remainder, or in use, shall be, immediately after the same fine levied, engrossed, and proclamations made, adjudged accepted, deemed, and taken, to all intents and purposes, a sufficient bar and discharge for ever against the said person and persons and their heirs, claiming the said lands, tenements, and hereditaments, or any parcel thereof, only by force of such entail; and against all other persons claiming the same, or any parcel thereof, only to their use, or to the use of any manner of heir of the bodies of them; any ambiguity, doubt, or contrariety of opinion arisen or grown upon the said statute to the contrary notwithstanding."

Effect of these Statutes in barring Estates Tail.

9. The statute of 32 Hen. VIII. having been professedly made for the purpose of explaining the statute 4 Hen. VII., they must be considered as forming one law. The doctrine established by them is, that a fine with proclamations shall bar all privies and strangers; and when levied of any manors, lands, tenements, or hereditaments entailed to the person levying such fine, or to any of his ancestors, shall

bar the said persons and their heirs, whether lineal or collateral, claiming by force of such entail.

10. The term by which the issue in tail are described in the statute 4 Hen. VII. is that of privy, which has various significations in law. It sometimes means that connexion which arises between persons who have entered into a mutual contract with each other, as between donor and donee, lessor and lessee; or else it signifies a relationship of blood, as between ancestor and heir. But in consequence of the stat. 32 Hen. VIII. it has been determined, that by the word privies in the stat. 4 Hen. VII. are meant those persons who are not only privies in blood to the persons who levy the fine, but also privies in estate and title to the land whereof the fine is levied; that is, those who must necessarily convey their descent through the cognizor, before they can make out their title to the estate; which comprehends the issue in tail: and a person who is privy within the intention of the stat. 4 Hen. VII. is an heir in tail within the intention of the stat. 32 Hen. VIII., *et sic è converso*. 1 Inst. 271 *a*. 8 Rep. 42 *b*. Touch. 21.

11. Thus if a tenant in tail in possession levies a fine with proclamations, it will be an effectual bar to all his issue; for they are privy to him both in blood and estate, and can only make a title to the estate tail as his sons.

12. Husband and wife being tenants in special tail, by gift after their marriage, the husband alone levied a fine; the wife survived. It was determined in 18 Eliz. and also in 10 Ja. I. that the fine was a good bar to all their issue: for in making out their title they must necessarily show themselves to be heirs to the father, as well as to the mother; and Beaumont's Case, 9 Rep. 138. S. C. Cro Car. 476. Baker v. Willis.

therefore they were privies both in blood and estate to the cognizor of the fine*.

1 Inst. 372 *a*. 13. Lord Coke says, if lands were given to the elder son and the heirs of his body, remainder to his father and the heirs of his body; and after the father's death, the eldest son had levied a fine with proclamations, and died without issue; the second son would have been barred by the fine; because the remainder which was limited to the father and the heirs of his body, having descended on the eldest son, the second son, in making out his title to this remainder, must convey his descent through his elder brother, by which means he would become a privy to him, both in blood and estate.

Tit. 32. c. 21. § 35. 14. It has been stated in a former title, that a limitation to the heirs of the body of A., provided A. be dead when the limitation takes effect, will vest in the person answering the description of such special heir; and in case of his death without issue, will go to the person who would be entitled to such estate, if it had originally vested in the ancestor of the first taker; and that this devolution, after the decease and failure of issue of the first special heir of A. to the other heirs, equally falling within the same description, is *quasi* a descent *per formam doni*; from which it is apprehended, that if the first or any other of the persons taking an estate in this manner, levies a fine of it, the estate tail will be barred; because all the persons taking under the original

* The authority of this case appears doubtful; for the husband and wife took by entireties, the gift being after marriage; and upon the death of the husband, the whole survived to the wife, from whom it descended to the heirs of her body, who did not derive any thing from their father. Vide Tit. 18. c. 1. § 46.

words are in by a species of descent, and are therefore *privies* to those who take before them.

15. The privity must be both in blood and estate, for privity in blood only will not be sufficient: and therefore if lands be given to a man, and the heirs female of his body, who has a son and a daughter, and the son levies a fine and dies without issue, it will be no bar to the daughter; for although she is privy in blood to her brother, yet she is not privy in estate or title to him, as she can make her title to the estate without conveying her descent through him, or even mentioning him. Godfrey's Case, 13 Vin. 213. Touch. 21.

16. It follows from the same principle, that if a tenant in tail has issue a daughter, who levies a fine, and afterwards a son is born, he will not be barred by his sister's fine; because he can make his title to the estate tail, as heir of the body of his father, without conveying his descent through his sister. Hob. 333.

17. As a tenant in tail may convey his whole estate by fine; so he may create any lesser estate out of it, which will likewise bind his issue after his death.

18. Thus a tenant in tail may create a term for years by fine, which will be good against his issue. Smith v. Stapleton, Plowd. 430.

19. If a tenant in tail accepts a fine from a stranger, it has no operation whatever; and after his death his issue may enter, and aver a continuance of the estate tail in his father: but if a tenant in tail makes a grant and render in such fine, it will then, when executed, bar his issue. 2 Inst. 517. 3 Rep. 89 *b*. 1 Mod. 117. infra, c. 14. Jenk. 275. 2 Inst. 517.

20. The grant and render must however be of something that is entailed. Thus if a stranger levies a fine to a tenant in tail, who grants and renders to him a rent in fee, the issue in tail shall avoid the rent; for he is remitted to the land, and the fine shall not bind him for the rent, because his ancestor Plowd. 435. Jenk. 275.

was not tenant in tail of the rent, but of the land: the rent was another thing than that which was entailed, and therefore the fine was not levied of any thing entailed; so that the rent is out of the provision of the stat. 32 Hen. VIII.

Stevens v. Winning, 2 Wils. R. 219.

21. A tenant in tail being guilty of murder, levied a fine before conviction, and it was doubted whether it should bar the issue for the lord's benefit. The Court inclined to think it should; but no judgment was given.

Rutland's Case, Cro. Ja. 40. Jenk. Cent. 321.

22. A fine *sur concessit* will bar an estate tail as long as it continues in force: therefore any estate created by a fine of this kind will be good against the issue in tail.

23. Although a fine levied by a tenant in tail may be defeated by a person claiming some particular estate in the lands of which the fine is levied, yet it will still continue to be a good bar to the issue in tail.

1 And. 43. Case 109. 3 Rep. 91 *a.*

24. A tenant in tail discontinued in fee: he afterwards disseised the discontinuee, and levied a fine with proclamations: the discontinuee entered on the land, and avoided the estate which passed by the fine as to himself. The question was, whether the heir in tail was remitted or not; and the Judges were unanimous that the heir in tail was not remitted, but was barred by the stat. 32 Hen. VIII., although the estate which passed by the fine was avoided.

Vide infra Hunt v. King. S. P.

Plowd. 227. 7 Rep. 32 *a.*

25. Where the King is tenant in tail, he may, by a fine levied on a grant and render, bar his estate tail; because, it having been determined in Lord Berkeley's case that the King was bound by the statute *de donis*, it was but reasonable that his Majesty should take advantage of those statutes which enable tenants in tail to bar their estates.

26. It is not necessary that a tenant in tail should be in the actual possession of the estate tail, in order to be capable of barring his issue by fine: for the statute 4 Hen. VII. has expressly excluded parties and privies from averring, *quod partes finis nihil habuerunt;* and the statute 32 Henry VIII. makes a fine levied of any lands entailed to the person so levying the same, or to any of his ancestors, a sufficient bar against such person and his heirs. A fine, therefore, with proclamations, duly levied by a person having the right of an entail in him, will be a good bar to his issue; although, at the time when the fine was levied, he had never entered on the estate tail.

The Tenant in Tail need not be in Possession.

2 Inst. 517.

27. Lord Zouch brought a formedon in the descender for the moiety of a manor, against one Bamfield; who pleaded in bar that John, great grandfather of the demandant, levied a fine *sur cognizance de droit,* with proclamations, of the said moiety, which was granted and rendered by the same fine to the said John and his heirs, whose estate the tenant had. Lord Zouch replied, that at the time when the fine was levied, and at all times after, the said Bamfield was seised of the land in his demesne as of fee. And on solemn argument it was determined by all the Judges, that the demandant, being heir in tail to the person who levied the fine, could not aver the continuance of the land in a stranger; nor that *partes finis nihil habuerunt,* because the statutes 4 Hen. VII. and 32 Hen. VIII. bound the estate tail, although the person who levied the fine was not then in possession of it; which, Lord Coke observes, was the first determination on this point.

Zouch v. Bamfield, 3 Rep. 88. 1 Leon. 75.

28. A fine levied by a tenant in tail in remainder, expectant on an estate for life, or an estate

tail, will be a good bar to the issue of the person who levies the fine.

Case of Fines, 3 Rep. 84. Jenk. 274.

29. A. being tenant for life, remainder to B. in tail, reversion to B. and his heirs; B. levied a fine with proclamations of the estate tail, during the life of the tenant for life, and it was adjudged to be a good bar to the estate tail, under the words of the statute 32 Hen. VIII.

3 Rep. 90 *a*.

30. If a tenant in tail makes a feoffment of the estate tail, and afterwards levies a fine of it, his issue will be thereby barred.

Hunt v. King, Cro. Eliz. 610.

31. William King, the grandfather, being tenant in tail, enfeoffed Richard King, the father, in fee; and afterwards, William King disseised him, and levied a fine, with proclamations, to one Hitchcock. The father entered, and the cognizee of the fine entered on him. After the death of the grandfather and father, the son brought a formedon for the recovery of the land, to which the fine was pleaded in bar: the demandant pleaded the entry of his father, and judgment was given for him.

A writ of error was brought in B. R., and error assigned in matter of law, that this fine was a good bar to the issue in tail, by the statute 32 Hen. VIII.; for it was not to be compared to a fine at common law, nor to fines levied by other persons, because, in this case, it was sufficient that the fine was levied by the person who had the right of the estate tail in him, or to whom the land was entailed, although none of the parties to the fine had any estate of freehold in possession, remainder, or reversion, in the land whereof it was levied; as it was adjudged in the case of Zouch v. Bamfield.

ante, § 27.

The Court being of this opinion, the judgment was reversed.

32. Although a tenant in tail be disseised of the estate tail, yet if, during the disseisin, he levies a fine to a stranger, it will bar his issue; who will not be allowed to plead that his ancestor was not seised of the estate tail when he levied the fine. 3 Rep. 90 *a.* Jenk. 275.

33. If the issue in tail levies a fine in the lifetime of his ancestor, who is then seised of the estate tail, the ancestor himself may afterwards levy a fine, and thereby bar his issue, and also the person to whom the issue levied the fine. So that in all cases of this kind, it is understood, that the tenant in tail dies without barring the estate tail, by which means it descends upon the issue. Touch. 26.

34. In the case of a lineal descent, the issue in tail may be barred by the fine of his ancestor, although at the time of levying the fine, the ancestor had only a possibility of an estate tail, which never took effect: because the issue, in making his title, must convey his descent through such ancestor, which makes him a privy to him. A Possibility of an Estate sometimes barrable.

35. Lands were given to A. and his wife in special tail. A. died, leaving issue, a son, who disseised his mother, and levied a fine with proclamations. Archer's Case, 3 Rep. 90 *a.* Hob. 333.

It was resolved by all the Judges, that this fine was a good bar to the issue of the son; although the son, at the time when he levied the fine, had only a possibility of an estate tail, his mother being then alive. For the statute 32 Hen. VIII. ought to be expounded according to the letter of it; and as the land was entailed to the ancestor of the person who levied the fine, although such ancestor was alive, so that no estate or right had descended on the person who levied the fine, which he could pass or extinguish, yet as the statute says, "entailed to the person so levying the same, or to any of his ancestors," in

the disjunctive, it was adjudged, that the fine did bar the right which afterwards descended to him, not only as to himself, but also as to all his issue.

86. This principle was carried much farther in the following case.

Grant's Case, 10 Rep. 50 *a.*

W. Grant devised his lands to John Grant, when he should attain the age of twenty-five years, to hold to him and the heirs of his body. John Grant, the devisee, after he had attained the age of twenty-one years, but before he was twenty-five, levied a fine of the lands thus devised; and the question was, whether it should bar his issue.

It was resolved that the estate tail was barred by this fine, although John Grant, when he levied it, had but a bare possibility of an estate tail. Lord Coke says, no judgment was given; but Croke and Leonard, who have reported this case by the name of Johnson v. Bellamy, say, judgment was given that the estate tail was barred by the fine. And in Sir Thomas Raymond's Reports, 149, it is said, that although the estate was not barred by the statute 4 Hen. VII. it was well barred by the statute 32 Hen. VIII. in consequence of the words, "all fines levied by any person or persons, &c. of any manors, &c. before the time of the said fine levied in any wise entailed to the person or persons so levying the same fine, or to any of the ancestors of the same person or persons."

Cro. Eliz. 122. 2 Leon. 36.

87. This doctrine, however, only extends to cases where the descent is lineal; for in the case of a collateral descent, a fine levied by a person who was never seised of the estate tail, and on whom it never descended, but who had only a possibility of an estate tail, is no bar to a collateral heir in tail of the person who levied the fine; because, in making

his title to the estate tail, he need not convey himself through him, so that he is not a privy to him.

38. A husband made a feoffment to the use of himself and his wife, and the heirs male of their two bodies; remainder to the heirs male of the body of the husband, remainder to the heirs of their two bodies, remainder in fee to the husband. The husband and wife had issue, a son and a daughter. The husband died: the son made a lease, to commence after the death of his mother; then levied a fine with proclamations, to the use of himself in fee, and died without issue, in the lifetime of his mother. The question was, whether this lease was good against the daughter.

Macwilliam's Case, Hob. 332. W. Jones, 31. S. C. by the name of Godfrey v. Wade.

It should be observed, that the estate tail limited to the husband and wife, and the heirs male of their bodies, vested wholly in the wife, after the death of her husband, though she was within the statute 11 Hen. VII. c. 20.; and the remainder to the heirs male of the body of the father was in the son at the time when he levied the fine. But these estates became extinct when the mother and son died, so that the lease in question could only be derived out of the remainder to the heirs of the bodies of the husband and wife, to which both the son and the daughter were inheritable.

infra,

It was determined by Lord Ch. J. Hobart, Hutton, and Jones, against the opinion of Winch, that although, in a lineal descent, the issue in tail were barred by the fine of their ancestor, notwithstanding such ancestor had but a possibility of an estate tail when he levied the fine, yet, in a collateral descent, the case was very different, as it was not necessary that the issue in tail should make mention of every collateral issue inheritable before him, as in a lineal

one; and that in the present case, as the estate tail never descended on the son, his fine could be no bar to his sister, who was not privy to him, because she could make her title to the estate tail without conveying her descent through him, or even mentioning him in her pedigree. Judgment was given that the lease was void as to the sister. But it was observed, that if the estate tail had descended on the son, his fine would then have barred his sister; because, in that case, she must have conveyed her descent through him, in order to make out her title to the estate tail, by which means she would have been privy to him.

Bradstock v. Scovel, Cro.Car. 434.

39. So where an eldest son levied a fine of an estate tail, which was then vested in his mother, and died in her lifetime, so that the estate tail never descended on him,

It was adjudged in the Court of Common Pleas, by three Judges against one, that this fine did not bar the second brother; and upon a writ of error, all the Judges of the King's Bench were of the same opinion: because, as the estate tail never vested in the elder brother, the younger brother was not privy to him.

An Estate Tail in a Rent-charge is barrable.

40. It has been stated, that a fine may be levied of a rent-charge; consequently, an estate tail in a rent-charge may be barred by a fine levied of it; and a tenant in tail of a rent-charge may also bar it by levying a fine of the lands out of which the rent issues.

Heliot v. Saunders, Cro. Ja. 700. 1 Ves. 391.

41. Upon demurrer, the case was thus:—A person who was tenant in tail of a rent-charge, issuing out of the manor of Kingsbury, granted by Sir Ambrose Cave, levied a fine of the manor to Sir A. Cave and his heirs; and the fine was pleaded in bar of an

avowry for this rent, by the heir in tail. The fine was levied of the rent, *per nomen manerii;* and an averment was made, that the fine was levied by agreement of the parties, with an intent to bar the rent.

The defendant pleaded non-comprised, which being demurred to, and argued several times, it was held by Lord Ch. J. Hobart and Harvey, that the rent was barred by the fine, because, being levied of the land, it passed the rent inclusively, being directed by the agreement of the parties.

And in an Advowson. Plowd. 435.

42. As a fine may be levied of an advowson in gross, so a tenant in tail of an advowson in gross may bar his issue by a fine levied according to the statute 4 Hen. VII. It is, however, said in Plowden, that if a tenant in tail of an advowson grants and renders to another, by fine, the nomination of a clerk to the advowson, this will not bind the issue, upon a principle already stated: for that the right of nomination is a thing distinct from the advowson, and not entailed. Modern writers have, however, thought differently on this subject, on the principle, that the presentation and nomination are, in effect, the same thing, being the fruit and full profit of the patronage. But if a tenant in tail of an advowson grants by fine the nomination of a clerk to one and his heirs, so that when the church becomes void, the grantee and his heirs may nominate a clerk to the tenant in tail and his heirs, and that he or they shall present the clerk so nominated to the ordinary; such a fine will not bind the issue in tail, because there the nomination and presentment are distinguished, so that the fine is not levied of the thing entailed.

ante, § 20.

Watson, 84. Dodd. 63.

And in a Trust Estate.

43. Where a person is tenant in tail of an equitable or trust estate, and levies a fine of it, such fine will

have as extensive an operation in barring his issue, as if he had been seised of the legal estate. This doctrine will be fully stated in a subsequent chapter.

c. 10.

A Fine bars the Issue in Tail before Proclamations.

44. Although no fine is a bar to an estate tail but a fine with proclamations, levied pursuant to the statute 4 Hen. VII.; yet as soon as a fine is levied, and before all the proclamations are past, it is a good bar to an estate tail, provided the proclamations are afterwards duly made; and the issue in tail cannot save his right by entering before all the proclamations are made.

Plowd. 434.

45. This point was formerly much doubted; and in the case of Smith v. Stapleton, 15 Eliz. it was contended by the counsel, that in consequence of the words in the statute 4 Hen. VII. "and the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers, &c." and also the words in the statute 32 Hen. VIII. "after the same fine levied, engrossed, and proclamations made, &c.," a fine was no bar to the issue in tail, if the ancestor died before all the proclamations were made; and Brook appears to have been of that opinion. The contrary, however, was determined in the following case.

Ab. tit. Fine, pl. 109.

Parslow's Case, cited 3 Rep. 90.

46. Sir G. Blount being tenant in tail of several manors, and having issue a daughter, levied a fine, and soon afterwards died. The daughter immediately brought a formedon for the recovery of the estate tail; pending which all the proclamations were made. It was unanimously determined, that the daughter was barred by this fine, though her ancestor had died, and she had commenced her action, before all the proclamations were made.

Lord Coke has made four observations on this case.

First—That though after a fine is levied, a right of an estate tail descends to the issue, yet as soon as the proclamations are made, the right, which thus descended, is barred by the fine.

Second—Though a formedon be brought and pursued, yet if the proclamations are all afterwards duly made, the fine will then be a good bar.

Third—When tenant in tail levies a fine, and dies before all the proclamations are made, the issue in tail is not within any of the savings of the statute 4 Hen. VII.; for if he were, then the bringing his formedon, before all the proclamations were made, would avoid the fine. infra, c. 11.

Fourth—That the proclamations serve no other purpose but that of distinguishing a fine levied pursuant to the statute 4 Henry VII. from a fine at common law.

47. So where a tenant in tail levied a fine, and died before all the proclamations were made, leaving a son beyond sea, who did not return till after all the proclamations were made, and then claimed the land. Case of Fines. 3 Rep. 84.

It was resolved by all the Judges, that although a right of entail descended to the son, on the death of his father, in consequence of his dying before all the proclamations were made, yet when all the proclamations passed, the right which descended to him was for ever barred, and the issue could not have saved it by any claim.

48. Before we quit this subject it may be proper to observe that the operation of a fine is merely to bar an estate tail, but not the remainders or reversion expectant on it; for a fine levied by a tenant in tail only transfers to the cognizee a base fee, that is, an estate to him and his heirs, as long as the tenant in A Fine does not bar Remainders.

tail has heirs of his body; but does not bar the rights of the persons in remainder or reversion, provided they enter or claim within due time.

But lets in the Reversion. 1 Show. R. 370. 1 Mod. 1.

49. Where the tenant in tail has the immediate reversion in fee in himself, he may make a good title by fine only; for in that case the operation of the fine will be to merge the base fee acquired by the fine, and bring the reversion into immediate possession; it being determined that a fine takes away the protection given to estates tail by the statute *De donis*; and that they then, like all other particular estates, become subject to merger and extinguishment, when united with the absolute fee.

This method of barring an estate tail is however attended with one considerable inconvenience, which will be mentioned in a subsequent chapter. c. 12.

Effect of the Warranty in a Fine.

50. A fine has also an effect on estates tail, in consequence of the warranty which is always inserted in the concord. Now it has been stated in a former title that a collateral warranty is not prohibited by the statute *De Donis*; and in Mr. Robinson's book on Gavelkind, it is said to be a common mistake to suppose that all collateral warranties are taken away by the statute 4 & 5 Ann. c. 16., whereas that statute only makes void all warranties by tenants for life, and all collateral warranties made by any ancestor not having an estate of inheritance in possession. So that if A. be tenant in tail, remainder to B. his next brother in tail, which is a very common case, arising almost on every marriage settlement; and A. being in possession levies a fine, with warranty from him and his heirs, and dies without issue; this is a collateral warranty to B.; for B.'s title is by way of remainder, to which his elder brother is collateral,

Tit. 32. c. 24. pa. 125. note.

Lit. § 716.

which shall bar, notwithstanding the statute, though no assets descend.

The Right to levy a Fine cannot be restrained. 1 Vent. 321. Tit. 13. c. 1. § 19.

51. The right to levy a fine pursuant to these statutes is an incident so inseparably annexed to an estate tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But a tenant in tail may be restrained from levying a fine at common law, because that is a tortious act, and only operates as a discontinuance to the issue.

Exceptions in these Statutes. § 3 & 4.

52. There are two clauses in the statute 32 Hen. VIII. by which it is declared, that it shall not extend to any fine levied of any lordships, manors, &c. the owners whereof, by any express words contained in any special act of parliament, made subsequent to the stat. 4 Hen. VII. are restrained from alienation; or to a fine of any manors, lands, tenements, or hereditaments given, granted, or assigned to the persons levying such fine, or to any of their ancestors in tail, by virtue of any letters patent of the Crown, or by virtue of any acts of parliament, the reversion whereof, at the time of such fine levied, being in the Crown; but that such fines should be of like force and effect, as they were if this act had not been made.

53. In consequence of the last of these clauses, the operation of fines levied by tenants in tail, where there is a reversion in the Crown, depends on the efficacy of the stat. 4 Hen. VII. And it is laid down by Lord Coke, that in this case a fine will bar the estate tail, but not the reversion; this doctrine is assented to by Dyer and Hobart, and is now considered as law. But where an estate tail is granted by the Crown, as a reward for services, it is protected

1 Inst. 372 *b*.

Dyer, 32. pl. 1. Hob. 332.

by a particular statute, of which an account will be given in a subsequent chapter.

c. 13.

Fines in inferior Courts no Bar to Issue in Tail. Elme's Case, Dyer, 373. Com. R. 624.

54. It has been stated that fines may be levied in courts of ancient demesne, and other inferior courts. They have however only the effect of fines at common law, which is to create a discontinuance, when levied of an estate tail; and do not bar the issue in tail from bringing a formedon. For no fine, unless it is levied with proclamations, pursuant to the stat. 4 Hen. VII. has the effect of barring an estate tail, except in the case of copyholds; of which an account will be given hereafter.

Tit. 37. c. 2.

TITLE XXXV.

FINE.

CHAP. X.

Effect of Fines in barring particular Persons, Estates, and Interests.

2. *Parties.*
3. *Lay Corporations.*
5. *Married Women.*
10. *As to their own Estates.*
16. *As to Dower and Jointure.*
26. *Effect of a Covenant that a married Woman shall levy a Fine.*
27. *Devisees.*
30. *Trust Estates.*
39. *Terms for Years.*
44. *Copyholds.*
48. *Estates held by Statute Merchant, &c.*
51. *Powers appendant or in Gross.*
58. *But not Powers collateral.*
62. *A Right of Entry.*
63. *Writs of Error.*

SECTION 1.

THE object of the statute 4 Hen. VII. was not confined to the enabling tenants in tail to bar their issue; it was also intended to secure those who were in possession of land against all dormant claims; the words of the statute being so extensive that they comprehend almost all persons, and almost every kind of estate or interest in lands. And where a fine and non-claim is pleaded, a court of law will not enter into any discussion of the title, till that is accounted for. Driver v. Lawrence, 2 Black. R. 1259.

2. All those who are parties to a fine are immediately barred, even though they labour under disabilities, except infants; and they are also barred, unless the fine is reversed during their minority. Parties. ante, c. 5. § 36.

Lay Corporations.

3. Lay corporations, who have an absolute estate in their possessions, and a power of alienation, may be barred by a fine and non-claim.

Croft v. Howell, Plowd. 536.

4. The Cooks of London, who were incorporated by King Edw. IV. bargained and sold a part of their lands in fee; the bargainee entered and levied a fine with proclamations, and five years passed. The bargain and sale proved to be void, on account of a misnomer in the corporation, and it became a question whether the corporation was bound by the fine and non-claim.

It was determined that the corporation was barred by the fine, because the stat. 4 Hen. VII. was made for the public good, and to settle and quiet men's inheritances; that therefore the words of it ought to be construed in the most extensive sense, for the benefit of those who were in possession of lands, and for barring the rights of all persons who were remiss in making their claims: so that although the words only extended to natural persons, and their heirs; and no mention was made of any corporation or successors, yet it was the intention of the legislature that it should extend to such corporations, as had in themselves an absolute estate and power of alienation.

Ecclesiastical corporations however are not barred by a fine and non-claim, as will be shown hereafter. c. 13.

Married Women.

5. By the common law, a married woman could not, by joining with her husband in any deed or conveyance whatever, bar herself, or those claiming under her, of any estate whereof she was seised in her own right; or of that portion of her husband's real property, which the law has provided for her support, in case she survives him. This rule pro-

bably arose from that principle of law, that the legal existence of a woman is suspended during her marriage, or at least is incorporated or consolidated into that of her husband; or else from a fear that her husband should use any compulsion, in order to force his wife to part with her property or rights, in his favour.

6. But although a married woman was never bound by any deed or conveyance executed by her during the coverture; yet if an action was brought against a husband and wife for the recovery of any lands, whether the property of the husband or of the wife, and judgement was given against them, the wife was barred.

7. Thus it appears that till the statute of Westminster 2, even a judgement by default in a possessory action, against a husband and wife for the wife's freehold, was so far binding on her, that after her husband's death she could only recover her estate by bringing a writ of right. Now a fine being an accommodation of a suit, and a concord being deemed to have the same force and effect as a judgement in a real action; it follows that a married woman must have been as effectually barred by a fine as by a judgement in an adversary suit. Nor was it thought necessary to give the wife a power of claiming lands whereof she and her husband had levied a fine, because in that case she must have assented to it; whereas the husband might have put in a feint plea, or let judgement go against him by default, without the consent or even knowledge of his wife.

8. Mr. Hargrave, to whose learned note on Fines I am indebted for the preceding observations, has very properly suggested, that the common notion of a fine's owing its effect in barring married women to

1 Inst. 121 *a.* note 1.

their secret examination by the Judges or commissioners, is incorrect. This remark is fully confirmed by a passage in Glanville, from which it appears that a married woman might appoint her husband as her attorney to acknowledge a fine for her *, in which case it is highly improbable that she should have been examined. It may therefore be concluded that the private examination of a married woman was not a necessary circumstance at common law, and was probably first prescribed by the statute *De modo levandi fines.*

9. If a fine derived its efficacy in barring married women from the circumstance of their private examination, then that form might easily have been added to any other conveyance: whereas, by the common law, a bargain and sale by a husband and wife, on which the wife is privately examined, does not bind her, after the coverture is determined.

2 Inst. 673. Heb. 225.

As to their own Estates.

10. But whatever were the principles upon which this doctrine was originally founded, it is now fully settled that a married woman, by joining with her husband in levying a fine, may bar herself and her heirs of all here state and interest in any lands whereof he is seised in her right. And where a fine is levied by a husband and wife, of lands which are the property of the wife, the whole estate passes from the wife, and the cognizee is in by her only;

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* Potest autem pater ita loco suo filium pro se ponere, et vice versa, extraneus quoque extraneum, uxor quoque maritum: cum quis itaque maritus, positus loco uxoris suæ, in placito de maritagio, vel de dote ipsius uxoris, per judicium, sive per concordiam, &c. Glanville, lib. 2. c. 3. vide also ante, c. 5. § 5.

so that if the fine is afterwards reversed, the whole estate becomes again vested in the wife. 2 Rep. 57 *b.* 77 *b.* Doug. 44.

11. Where a fine is levied by a husband and wife, of lands which are the estate of the wife, the warranty should be from the husband and wife, and the heirs of the wife. Roll. Ab. Tit. Fine, O. pl. 3.

12. A husband and wife joined in exchanging lands, which were the estate of the wife, with a stranger, for other lands; and the exchange was executed. The husband and wife aliened the lands taken in exchange, and levied a fine of them to the alienee. Anon. 1 Leon. 285.

It was resolved that the wife might enter on her own lands after the death of her husband; and that her joining in a fine of the lands taken in exchange, did not bar her from electing whether she should claim her own lands, or those taken in exchange.

13. A married woman may bind herself by a warranty in a fine *sur concessit*; and an action of covenant will lie against her upon such a warranty.

14. Thus where a husband and wife levied a fine *sur concessit* to A. for 99 years, if he should so long live; with a general warranty against all persons during the said term: the husband died; and it was determined that an action of covenant lay against the wife, upon the warranty. Wotton v. Hale, 2 Saund. 180. 1 Mod. 290.

15. As a married woman may, by joining with her husband in a fine, make an absolute alienation of her estate, so she may also make a conditional one; and therefore if she and her husband mortgage her estate by fine, it will bind her and her heirs. Reason v. Sacheverell, 1 Vern. 41. Dolin v. Coltman, 1 Vern. 294.

16. It was formerly held that a married woman did not bar herself of her right to dower, by joining with her husband in a fine of lands, whereof she was dowable; because before the death of her As to Dower and Jointure. Plowd. 373.

10 Rep. 49 *b.* husband, the wife had no right of action. But the law has been long since altered in this respect, and it has been fully established, that if a husband and wife join in levying a fine of the husband's estate, to a stranger, the wife will be thereby barred from claiming her dower out of the lands comprised in the fine; because she, having nothing in those lands in her own right, her joining with her husband in a fine of them, could be for no other purpose than that of barring her from claiming dower. But a fine levied by the husband alone does not bar his wife of dower.

17. Where a married woman joins her husband in a fine, it will not only bar her from claiming dower out of the lands comprised in the fine; but will also bar her of any other interest in those lands.

Goodrick v. Shotbolt, Prec. in Cha. 333. Gilb. R. 18.

18. A man on his marriage entered into a bond for 600 *l.* to a trustee, with a warrant of attorney to confess judgement thereon, to be defeazanced on payment of 300 *l.* to his wife, if she should survive him. The wife afterwards joined her husband in a fine of all his lands.

It was agreed that the fine not only barred the wife from claiming dower out of the lands, but also destroyed her interest in the judgement.

19. Where a wife joins with her husband in levying a fine of lands, whereof her husband is seised in fee simple, without any declaration of uses, the use results to the husband, and a new right to dower accrues to the wife.

Tit. 11. c. 4. § 25.

10 Rep. 49 *b.*

20. Thus it is laid down in Lampet's case, that if a husband and wife grant a rent by fine, or make a lease for years, rendering rent to the husband and his heirs, and afterwards the wife recovers dower; she shall hold it, charged with the rent and the term.

In these cases the wife, though she joined her husband in a fine, was held dowable, subject only to the charges created by the fine; she must therefore have been entitled to dower out of the estate that resulted; for the uses of the fine being declared to be, to create a rent, or a term of years, the residue of the use resulted to the husband, and his widow became dowable of that residue.

21. In a subsequent case it was held, that where husband and wife joined in a fine to a purchaser, and the husband alone declared the uses of it, the wife was concluded of her right to dower, because no contradiction of the wife appeared, that she did not agree to the uses declared by the husband*. Haveringtons Case, Ow. 6. Tit. 32. c. 12. § 32.

22. It follows from this case that a fine levied by husband and wife without any declaration of uses, by either of them, would not bar the wife from claiming her dower; for although a fine levied by a married woman will bar her from claiming dower, against any person deriving under a sufficient declaration of the uses of such fine, yet a fine will not have that effect in favour of the heir, claiming by descent from the husband, for he must admit that his ancestor died seised, which will give the widow a title to dower.

23. A married woman may also bar herself of her jointure, by joining with her husband in levying a fine of it; provided it be made pursuant to the statute 27 Hen. VIII. and be a good bar of dower; because the wife, by accepting such a jointure, before 1 Inst. 36 *b*. Dyer, 358. pl. 49. 1 Bulst. 173. 1 Leon. 285.

* Mr. Sanders observes, that in this case the fine operated, so far as concerned the wife, as an extinguishment of her right to dower, and there could be no resulting Use upon a Conveyance operating as the release of a right, and not as the transfer of an Estate. Uses, 3d ed. v. 1. 180.

marriage, barred herself of her right to dower, so that she can claim nothing after her husband's death but her jointure, which she herself concurred in destroying by the fine. But if a jointure be settled on a woman after marriage, in which case it is no bar of dower, and she joins her husband in levying a fine of it, this will not prevent her from claiming dower out of any other lands whereof her husband was seised during the coverture; because the jointure being no bar of dower, the wife had her election on her husband's death, either to accept of the jointure, or to claim her dower; and therefore Lord Coke says, that a fine levied of her jointure, before her time of election, is no bar to her right of electing dower, when her time of election does come. But where it appears not to have been the intention of a husband and wife, in levying a fine, to bar the wife's jointure, it will not affect it in a court of equity.

Tit. 7. c. 1. § 21.

Solly v. Whitfield, Finch, 227.

24. Thus where A. upon his marriage, in consideration of 500*l.* portion, settled an annuity of 50*l.* a year on his wife, to be issuing out of particular lands. Afterwards A. and his wife joined in levying a fine of those lands to a mortgagee, who had notice of the annuity, which was excepted in the mortgage.

It was contended that the wife had by this means extinguished her annuity; but it appearing that it was not the intention of the parties to destroy this annuity, the court decreed that it should not be affected by the fine.

Anon. Skin. 238.

25. So where a jointure was settled on a woman, issuing out of some houses in London, which were burnt down; the woman joined her husband in levying a fine of the houses, to create a long term of years for

raising money to rebuild them. And it was agreed that the woman should have her jointure out of the reserved rent of the houses.

Adjudged that the fine did not affect the jointure.

26. Every kind of fine, with or without proclamations, and whether levied in the Court of Common Pleas, or in an inferior court, will bar a married woman; for fines derive this effect from the principles of the common law, and not from any statute.

Effect of a Covenant that a married Woman shall levy a Fine. Hall v. Hardy, 3 P. Wms. 187. *n.*

27. It is a common practice for a husband to covenant that his wife shall join him in levying a fine, and Sir Joseph Jekyll has said, that in such cases the Court of Chancery has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it. Because (says Mr. Cox) in all these cases it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose; and that the interest in such covenant has been taken to be an inheritance descending to the heir of the covenantee. But after all, if it can be made appear to have been impossible for the husband to procure the concurrence of his wife (as suppose there are differences between them), surely the Court would not decree an impossibility; especially where the husband offers to return all the money, with interest and costs, and to answer all the damages.

Vide Emery v. Wase, 8 Ves. 505.

Devisees.

28. The estate of a devisee may be barred by a fine and non-claim, if the devisee has not entered on the lands devised.

Hulm v. Heylock. Cro. Car. 200.

Thus where John Metcalf devised lands to John Gallant, an infant of the age of three years, in fee. The son and heir of John Metcalf entered on the lands, and levied a fine of them. John Gallant the

infant died before he attained his full age, leaving a sister who was then married.

The Court was of opinion that the sister must make her claim within five years after the death of her husband, otherwise the fine would bar her.

5 Rep. 124 *a*.

29. Executors to whom lands are devised for payment of debts, may also be barred by a fine levied of the lands thus devised, if they do not make their claim in due time.

Trust Estates. Clifford v. Ashley, 1 Cha. Ca. 268. Salisbury v. Bagot, Id. 278. 1 Freem. 311.

30. A fine is a good bar to a trust estate, as well as to a legal one; because the *cestui que trust* has an equitable interest, and is therefore bound to pursue the proper remedies for securing it: and if this were not the case, the operation of a fine would be much less extensive than it is, as there are so many trust estates now always existing. Thus if A. is seised of lands in trust for B. and a stranger enters on those lands, and levies a fine of them with proclamations; if five years pass without any claim being made, this fine will be a good bar, both to A. who had the legal estate, and to B. who was the *cestui que trust*.

31. But with respect to equitable titles there is a distinction; for where the equity charges the lands only, a fine and non-claim is a good bar; but where it charges the person only, in respect of the land, it is then no bar.

Gilb. Cha. 62.

32. Thus if a trustee levies a fine of the lands whereof he is seised in trust, to a person who has notice of the trust; or if a man purchases from a trustee, with notice, and levies a fine; the *cestui que trust* will not be barred: because the fine being levied to a person, or by a person who has notice of the trust, the land will continue subject to the trust; and therefore the Court of Chancery will not permit the

fine to be a bar: so that whenever a person is charged as claiming under a trustee, he must either set up an opposite title, and deny his claiming under the trustee; or else, if he does claim under the trustee, he must set forth that he paid a valuable consideration for the lands, and deny that he had any notice of the trust. vide infra, c. 14.

33. If however the title is merely a legal one, and a man has purchased an estate which he sees himself has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaser with notice, so as to make him a trustee for the person who had the right: because, as Lord Hardwicke observes, this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine's being levied. 2 Atk. 631.

34. It should however be observed, that where a fine is levied by a trustee, or a person who has notice of the trust, it is not void at law, but the person to whom the fine was levied, without consideration, or with notice, becomes himself a trustee for the real owner. Vide infra, c. 14.

35. Having examined in what cases a *cestui que trust* may be barred of his trust estate, by the fine of a stranger; it will also be necessary to inquire how far a fine levied by a *cestui que trust* himself is a bar to his trust estate.

36. Before the statute of uses, if a *cestui que use* had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt;* because the *cestui que use* had no estate in the land, but was barely tenant at will to his trustees. But modern Chancellors have very much altered the law in this respect, as it has been long since settled, that a *cestui que trust* in tail may, by a fine duly levied, bar his issue, as fully as if he had the legal estate; for other- Year Book, 27 Hen. VIII. 20. Bro. Ab. Tit. Fine, pl. 4. 2 Cha. R. 78.

wise trustees, by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from executing the power given him by the law over his estate, which would be extremely inconvenient, and tend to the introduction of perpetuities.

Basket v. Pierce, infra, c. 11.

37. Where a married woman is entitled to a trust estate, for her sole and separate use, she may bar it, by joining with her husband in a fine.

Penne v. Peacock, Forrest, 41.

38. A woman before marriage conveyed, with her husband's privity, her estate to trustees, in trust to pay the rents and profits to her sole and separate use for her life; and after her decease, in trust for such uses as she, whether sole or covert, should by her last will limit and appoint; and for want of such appointment, then to her own right heirs for ever.

The husband mortgaged part of the lands for a term of 500 years, and then a fine was levied by the husband and wife, who both declared the uses of the fine, as to the mortgaged premises, to be to the plaintiff, the mortgagee, for securing the payment of his principal and interest.

The wife, by order of the Court, answered separately, and insisted in her answer that she had been forced to join her husband by duress, insinuating the mortgage to be fictitious, and in trust for the husband, in order to defraud her. She further insisted that there was no power reserved to her to dispose of her real estate, but by her last will; that she had no estate in the premises, and that the fine and mortgage were both void.

It was argued for the married woman, that the legal estate being in the trustees, the parties to the fine had not such an estate in them whereof a fine could be levied, to bar the wife's right. And that this being a mere naked power, without any interest,

could not be barred by the fine, but remained still in the wife, by force of the first conveyance.

Lord Talbot said, the chief objection was, that the legal estate being in the trustees, the husband and wife had not such an estate in the land whereof a fine could be levied, to bar the wife's right. But as to that, it was very well known that the operation of fines and recoveries was the same upon trusts as upon legal estates: and if so, it must inevitably follow, that an estate for life, limited to the wife, and the remainder limited to her own right heirs, in default of any appointment made by her last will, were both disposed of by the fine; and if no such remainder had been limited by it, as the estate was the wife's own, and moved originally from her, whatever was not conveyed, would have remained in her, and consequently been barred.

Decreed the trustees to convey to the mortgagee.

39. Terms for years may be barred by a fine, if the lessees were, or ever might have been, in possession. Terms for Years.

40. Thus, where a lease for years was made of certain lands, to begin after the determination of a lease then subsisting; the first term expired, the second lessee neglected to enter, and the person in reversion entered, made a feoffment, and levied a fine with proclamations of the land. Five years passed without any claim being made by the second lessee; and the question was, whether he was barred by the fine. Saffyn's Case, 5 Rep. 123. Cro. Ja. 60.

It was resolved, that although a lessee for years had not himself such an estate as would enable him to levy a fine, yet it did not therefore follow that his interest should not be barred by a fine. That a term for years was within the statute 4 Hen. VII., being comprehended under the word *interest;* and as the ante, c. 5. § 22.

object of that act was to prevent strifes and debates, it would not have that effect if its operation did not extend to long terms for years, which were then so common.

Ischam v. Morrice, Cro. Car. 109.

41. This principle was carried so far, that where a person, who had a long term for years, assigned it over to a trustee, in trust for himself, then purchased the freehold and inheritance of the lands, and levied a fine, it was resolved that the term was barred, the assignee of it having suffered five years to pass without making any claim.

2 Vent. 329.

Mr. Justice Ventris has taken notice of this case, and observed that the cognizee of the fine, who was also the purchaser of the freehold, did not know of the term, or that it was held in trust for him; so that if the fine had not barred it, he would have been cheated. But that where a term is assigned in trust for the person who is seised of the inheritance, and who is in possession, a fine levied by him will not destroy the term; because the owner of the inheritance is, in cases of this kind, tenant at will to his trustee. And this doctrine has ever since been adhered to; so that it is now a settled principle, that terms for years, which are kept on foot by purchasers for the purpose of protecting the inheritance, are not barred by fine; otherwise fines would frequently weaken the interest of purchasers, instead of adding to their security.

1 Lev. 272. 1 Vent. 82. Sid. 460. 3 Keb. 564.

42. It is also fully established, that a term of years which is vested in trustees, on any other particular trust, except that of protecting the inheritance, may be barred by a fine and non-claim.

Hanmer v. Eyton, 1 Cha. R. 27. 33 Comb. 67.

43. Thus, where A. had a term for years vested in him, for securing children's portions; B. being in possession, levied a fine, and five years passed without

any claim being made. It was resolved by the Court of K. B. that, admitting the term was in trust, it was barred by the fine.

If a person makes a lease for years, and still continues in possession, he is considered as tenant at will to the lessee for years; and if the lessor, being thus in possession, levies a fine, it will be no bar to the term for years: because the possession of the tenant at will being the possession of the person in remainder, his interest is not divested; and it will be shown in a subsequent chapter, that no estate is barred by a fine, unless it be divested out of the real owner. c. 13.

44. We have seen that a copyholder cannot implead, or be impleaded, for his copyhold in the King's courts; and therefore cannot levy a fine of it in the Court of Common Pleas. But, notwithstanding, a copyhold estate is considered as an interest within the statute 4 Hen. VII., and therefore may be barred by a fine, levied by the person who has the freehold of the land. Copyholds.

45. Thus, Lord Coke says, if a copyholder be disseised, and the disseisor levies a fine with proclamations, and five years pass without any claim made, this is a bar both to the lord and to the copyholder. Coke, Cop. § 55.

46. It was resolved by the Court of Common Pleas in 10 Ja. that lands held by copy of court-roll were within the words and intent of the statute 4 Hen. VII. For as leases for years were considered within the act, on account of the word *interest;* and because great mischief, vexation, and trouble would ensue, if leases for years were not within the act; so, greater mischief, vexation, and trouble would ensue, if the act did not extend to customary lands, held by copy; for a great portion of them was granted in fee simple. Margaret Podger's Case, 9 Rep. 104.

47. There is a custom in most manors, that copyholds may be entailed; but even if a fine was allowed to be levied of a copyhold in the court of the manor of which it is held, it will not bar such an entail, because it is not levied pursuant to the statute 4 Hen. VII., unless it is allowed by the custom to have that effect.

Vide Tit. 37. c. 2.

Estates held by Statute Merchant, &c.

48. Estates held by statute merchant, statute staple, and *elegit*, are comprehended within the statute 4 Hen. VII., and may therefore be barred by a fine and non-claim, provided the lands be extended.

Ognel v. Arlington, 1 Mod. 217.

49. Thus, upon a trial at bar, the Court delivered it as law to the jury, that where lands were actually extended, on a writ of *elegit*, the tenant by *elegit* might be barred by a fine and non-claim; and that where an inquisition upon an *elegit* is found, the party has the possession before entry, and may bring an ejectment, or action of trespass.

50. So in the case of Deighton v. Grenville, which will be stated in the next chapter, all the Judges agreed, that, although the cognizees of statutes merchant did not enter, yet that they had possession in law, in consequence of their extents and *liberates*, which gave them a right of entry; and, therefore, they might be barred by a fine.

Powers appendant and in gross. 1 Inst. 237 *a*. 3 Rep. 83 *a*.

51. Powers appendant, or in gross, may be barred by a fine levied of the lands to which such powers relate, by the person to whom the powers are reserved; because, by the fine, the person acknowledges all his right and interest in the lands to be vested in another, and therefore it would be repugnant to that acknowledgement that he should ever afterwards claim any power over those lands. Besides, a power appendant, or in gross, being part

of the old dominion, is considered as an interest which may be released.

52. C. Digges being seised in fee, covenanted to stand seised to the use of himself for life, remainder over; reserving to himself a power of revocation, by deed, indented and enrolled. C. Digges revoked the uses; but before the deed of revocation was enrolled, he levied a fine of the lands. Digges's Case, 1 Rep. 173.

It was resolved, that the fine being levied before the enrolment of the deed of revocation, until which time the revocation was imperfect, had destroyed the power.

53. In the case of Penne v. Peacock, Lord Talbot said, that the power being coupled with an interest, and annexed to the wife's inheritance, it was destroyed by the fine: since, that a lease and release, or any other conveyance, would carry with them all powers that were joined to the estate. ante, § 38. Vide Bullock v. Thorne, Tit. 32. c. 18. § 10.

54. A power of revocation may also be destroyed in part, by a fine being levied of part of the land; and yet the power will continue good as to the residue. 1 Inst. 237 *a*. Touch. 501.

55. Where a person, who has a power appendant or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as an execution of his power, the fine and declaration of uses will, in that case, be considered as one assurance, and will not destroy the power.

56. Thus, in the case of Herring v. Brown, it was objected, that Sir J. Williams, by levying the fine, without any precedent declaration of uses to which it should enure, had destroyed his power of revocation: for the deed, being subsequent to the fine, was ineffectual, because there was an intermediate time, Tit. 32. c. 16. § 36.

between the leying of the fine and the execution of the deed, in which the forfeiture attached, and the power was destroyed; so that no subsequent act could purge the forfeiture which once attached, nor revive the power which was destroyed. For these reasons, and upon the authority of Digges's case, it was adjudged by the Court of K. B. that Sir J. Williams had, by levying the fine, destroyed his power of revocation; and therefore that the subsequent declaration of uses was void.

Carth. 22. 1 Freem. 486.

On a writ of error, in the Exchequer Chamber, this judgment was reversed, by the opinion of six judges against two: it being determined that the fine and declaration of uses were to be considered as one and the same conveyance, and operated as an execution, and not as an extinguishment of the power. It was agreed, that a fine alone, without a deed to declare the uses of it, would have extinguished the power; but that it was otherwise where there was a deed declaring what the intention of the parties was when the fine was levied; and although the date of the deed was subsequent to that of the fine, for no other reason, perhaps, but because the fine was levied in the vacation, and was dated as of the preceding term, still it was possible that the deed was executed at the time the fine was acknowledged: so that it would be unreasonable to make a forfeiture or extinguishment of a right merely by relation, which was but a fiction of law.

Doug. 45. S. P.

57. This doctrine has been confirmed by the Court of K. B. in the case of Doe v. Whitehead, which will be stated in a subsequent chapter. So that now, whenever a fine is levied, and a declaration of the uses of it is afterwards executed, the fine and declaration of uses will be considered as one assurance.

58. A power collateral to the land, which is not joined with an interest, cannot be barred or destroyed by a fine levied by the person to whom such a power is reserved: because it is considered as a bare and naked authority, which cannot be released or divested. But not Powers collateral. 1 Inst. 237 *a*. Tit. 32. c. 18.

59. Thus it is said by Lord Ch. J. Popham in Digges's case, that if a feoffment was made to A. in fee, to divers uses, with a proviso that it should be lawful for B. to revoke those uses; B. could not in that case release his power; and a fine levied by him would not extinguish it; for it was merely collateral, and the land did not move from him, nor should the party be in by him, nor under him. 1 Rep. 174 *a*.

60. It follows from the same principle, that a power, collateral to the land, cannot be barred by the fine of a stranger.

61. Thus, where a person, by a proviso in his marriage settlement, gave his intended wife a power to dispose of 100*l*. to such persons as she should appoint, to be paid within one year after his decease; and, in default of payment, one John Moreton was empowered to make a lease of certain lands, to raise that sum. The wife, in a year after the death of her husband, made an appointment of the 100*l*., but it was not paid. The heir of the husband levied a fine of the land, and five years passed; afterwards, the appointees of the 100*l*. brought their bill to be paid that sum. Willis v. Shorrall, 1 Atk. 474.

Lord Hardwicke observed, that though, by the several statutes relating to fines, all right, claim, and interest which strangers had, were barred by a fine; yet that such a stranger as John Moreton, who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it.

A Right of Entry.

62. A right or title of entry for a condition broken, may be barred by a fine levied by the grantee or devisee of the conditional estate.

Mayor of London v. Alsford, Cro.Car.575. W. Jones, 452.

63. Thus, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year, for the support of a schoolmaster, &c.; and on non-performance of the trusts, the lands were devised over to other persons. The trustees neglected to perform the trusts, and levied a fine of the lands.

It was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition.

Touch. 154.

64. A title of entry for a condition broken may also be barred by a fine levied by the grantor of the conditional estate; as if a person makes a feoffment upon condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee, or to any other person; the condition will be thereby discharged for ever.

Cromwell's Case, 2 Rep. 69.

65. But if the fine had been levied for the purpose of corroborating the conveyance by which the condition was created, it would not have destroyed the condition; for in that case the fine and conveyance would be construed together, and would operate as one assurance.

66. It seems that a right or title of entry on any other account may also be barred by a fine.

Thomasin v. Mackworth, Carter, 75.

67. H. Mackworth, upon his marriage, made a feoffment to trustees and their heirs, to the use of himself for life, remainder to his eldest son in tail, reversion to himself in fee; and covenanted to pay 200*l.* to the trustees within three months after the birth of each child; with a declaration, that if such payment was not made, then the feoffees and their

heirs should stand seised of the premises until they had levied the said sums. The money was not paid; so that the estate of H. Mackworth, being with a *quousque*, ceased; but the trustees did not enter. H. Mackworth, on the marriage of his son, conveyed the lands by lease and release to uses, and levied a fine to those uses; after which, five years passed without any entry or claim.

Lord Ch. J. Bridgeman delivered the opinion of the Court, that the entry of the trustees was barred by the fine.

68. A fine and non-claim is a good bar to a writ of error, in consequence of the word *actions* in the second saving of the statute 4 Hen. VII. And a fine is also a good bar to a writ of error to reverse a common recovery.

Writs of Error. Bartholomew v. Belfield, Cro. Ja. 332.

TITLE XXXV.

FINE.

CHAP. XI.

Of the different Savings in the Statute 4 Hen. VII. and the Exceptions in favour of Infants, Femes Covert, &c.

1. *Of the First Saving.*
6. *Of the Second Saving.*
23. *Married Women within this Saving.*
27. *And Bishops, Deans, &c.*
28. *And Persons having Offices.*
29. *And Strangers having different Rights.*
37. *Of the Third Saving.*
39. *Exceptions in favour of Infants, &c.*
52. *Case of Persons dying under their Disabilities.*

SECTION 1.

Of the First Saving.

THE great inconveniences which arose from the statute of non-claim, were removed by the statute 4 Hen. VII.; and a proper medium was established, between the unbounded latitude given by the former of those statutes, and the rigour of the common law; for the doctrine of non-claim was restored, but the time allowed for making a claim was extended from one to five years.

4 Hen. VII. c. 24. § 3.

2. The words of this clause, which is called the first saving, are, "Saving to every person and persons, and to their heirs, other than the parties to the said fine, such right, title, claim, and interest, as they have to or in the said lands, tenements, or hereditaments, at the time of such fine engrossed; so that

they pursue their title, claim, or interest, by way of action or lawful entry, within five years next after the same proclamations had and made."

3. In consequence of this clause, all those who have any present right or claim to lands whereof a fine has been levied, are allowed five years, to be computed from the day on which the last proclamation was made, to make their claim. And although there be no transmutation of possession, and the cognizor be in of the old use, yet after five years it will operate as a bar to all claims whatever. Touch. 30. 2 Wils. R. 19.

4. If, therefore, a tenant in tail is disseised, and the disseisor levies a fine with proclamations, the tenant in tail, having a present right, is within the first saving of the statute, and may defeat the fine at any time within five years after the last proclamation has been made; but if he neglects to make his claim within that time, he will be for ever barred: and if the tenant in tail dies before the five years are expired, his issue may avoid the fine within the five years, but not after. 3 Rep. 87 *b.*

5. With respect to the modes of avoiding a fine within the term prescribed by the statute, they will be pointed out in a subsequent chapter. c. 14.

6. By the common law, persons in remainder and reversion were frequently barred by the neglect of the particular tenant to make a claim within a year and a day after a fine was levied; and this is commonly assigned as the reason for making the statute of non-claim. But cases of this kind are particularly provided for by the following clause in the statute 4 Hen. VII. § 4. which is usually called the second saving. Of the Second Saving ante, c. 8.

"And also saving to all other persons such action, right, title, claim, and interest in or to the said lands, tenements, or other hereditaments, as shall

first grow, remain, or descend, or come to them; after the said fine engrossed and proclamations made, by force of any gift in tail, or by any other cause or matter, had and made before the said fine levied; so that they take their action, or pursue their said right and title, according to law, within five years next after such action, right, claim, title, or interest to them accrued, descended, fallen, or come."

7. In consequence of this clause, all those to whom a right accrues at any time after a fine has been levied, from any cause which existed before the fine was levied, are allowed five years, to be computed from the day on which their right first accrued, to make their claim.

Plowd. 374. 3 Rep. 87 *a*.

8. Thus, if a tenant in tail makes a feoffment, and the feoffee levies a fine, the issue in tail is within the second saving, and shall have five years from the death of his father to make his claim, and avoid the fine; because he is the first to whom a right accrued and descended after the fine was levied, for his father could not enter against his own feoffment.

Penyston v. Lyster, Cro. Eliz. 896.

9. In the same manner, if a tenant in tail bargains and sells his estate tail to a stranger in fee, who levies a fine of it with proclamations, the issue in tail is within the second saving; because the right first accrued to him, as his ancestor could not enter against his own bargain and sale.

Touch. 33.

10. If a tenant in tail discontinues his estate, reserving a rent, and dies, and the issue in tail accepts of the rent from the discontinuee, who afterwards levies a fine with proclamations; the acceptance of the rent by the issue in tail bars him from claiming the estate tail. But upon the death of the issue in tail, his issue will have five years to avoid the fine, in consequence of the second saving, because he was

the first person to whom the right of reversing the fine accrued.

11. If tenant in tail levies a fine, and five years pass, and afterwards the tenant in tail dies without issue, the persons in remainder and reversion are within the second saving, and have therefore five years to make their claim from the death of the tenant in tail without issue, because their right did not accrue till the determination of the estate tail. Plowd. 374. T. Raym. 151.

12. A *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within five years after the expiration of the estate tail. ante, c. 10. § 36.

13. A person devised lands to trustees for ninety-nine years, for the payment of his debts and legacies; and in case they should not act within six months after his decease, then he devised the same lands to another person and his heirs, in trust to pay his debts and legacies; and afterwards to A. in tail, remainder to B. in tail. A. levied a fine, and died without issue; five years passed without any claim by B. Basket v. Pierce, 1 Vern. 226. 9 Mod. 144.

Lord Keeper North was of opinion, that this fine by *cestui que trust* in tail, and the non-claim, barred the remainder-man in tail; for equitable rights were as well to be barred by fines as titles at law.

14. Where there is a term for years existing at the time when an estate tail determines, the remainder-man or reversioner will be allowed five years from the determination of such term to make his claim. Goodright v. Forrester, infra.

15. If lands are extended upon two statutes, and the person who is seised of the land levies a fine, it will divest the estates of the cognizees of such statutes, and the cognizee of the first statute must

make his claim within five years after the fine has been levied, otherwise he will be for ever barred. But with respect to the cognizee of the second statute, he need not make his claim till satisfaction has been entered on record on the first statute, because that is the only proper determination of an extent of that kind; so that he will have five years from that time to avoid the fine, by the second saving, for till then his right did not accrue.

Tit. 14. § 108.

Deighton v. Grenville, 2 Vent. 333. 1 Show. 36. 1 Skin. 260.

16. Thomas Lewis being seised in fee of the premises in question, acknowledged a statute for 1,200*l.* to William Knight; he afterwards acknowledged another statute for 1,000*l.* to Richard Gerrard, and another for 5,000*l.* to Sir James Elwes and Richard Burrows; execution was sued out on all these statutes, and the lands were extended. Thomas Lewis, being in actual possession, sold the lands for 4,000*l.* to John Lewis, and levied a fine of them with proclamations. John Lewis devised the lands to his brother Edward Lewis, and the heirs male of his body, and, for want of such issue, to his own two daughters. John Lewis died; and Edward Lewis, being in actual possession, levied a fine with proclamations, to the use of himself and his heirs, and died without issue, whereby the lands descended to the two daughters of John Lewis, who entered, and having married the Earls of Huntingdon and Scarsdale, they also entered, and were seised in right of their wives. Administration to Burrows, the surviving cognizee of the last statute, was committed to Ann, wife of the defendant Grenville, as to that statute and the extent thereon; and Grenville and his wife, who was also administratrix to Gerrard the cognizee of the second statute, having acknowledged satisfaction upon it, and caused it to be vacated, entered upon the Earls of Huntingdon

and Scarsdale, as administratrix to Burrows, in whom the last statute was vested, and claimed the money due on it; whereupon the said Earls brought an ejectment in the Court of King's Bench, in the name of Deighton, for the recovery of the lands. The question was, whether Grenville, a representative to Burrows, the cognizee of the last statute, which was a reversionary interest, to commence after the determination of Gerrard's extent, was barred by the fine of Thomas Lewis and five years non-claim, or was within the second saving of the statute 4 Hen. VII. and should be allowed five years to make his claim from the time when satisfaction was acknowledged on Gerrard's statute. The case was argued several times in the Court of King's Bench, and in 4 Jac. I. judgment was given for Grenville, that Burrows's interest was not barred by the fine. A writ of error was brought in the Exchequer Chamber, where the case was also several times argued. Mr. Justice Ventris contended, that there was a very great difference between this case and the case of reversions on estates for lives or years. 1st. Because in those estates there was, either by an express limitation of the parties or the operation of law, a certain end of the estate beyond which it could not last, and until which it was not properly determined, which an estate held by extent has not. 2d. Because, if a person who has a reversion after an estate held by extent was allowed five years to make his claim after the extent was determined by a perception of the profits, or an acknowledgement of satisfaction on record, then a claim was let in after an estate which no man could see the end of; for no person could tell when an extent would be satisfied by a perception of the profits, and much less whether satisfaction would

Vide 2 Vent. 333.

ever be acknowledged; whereas other estates have a known and certain determination, so that it would be impossible to tell within what space of time a possession could be quieted, and thus the great end of the statute of fines would be defeated. 3d. Because it would be in the power of the party who had the extent, to protract the time as long as he pleased; for, until he thought proper to bring a *scire facias ad computandum*, the statute would never be satisfied; so that it would be in the power of a stranger to make the estate of a person who was in possession under a fine, liable to a future claim as long as he pleased. The judgment of the Court of King's Bench was reversed by a majority of six Judges against two. But that Court refused to award execution, because there was a mistake in the writ of error; upon which a new writ of error was brought, whereon the judgment was affirmed for Grenville, there being three Judges for reversing, and three for affirming; and a majority being required to reverse the judgment, it was of course to stand.

Colles Parl. Ca. 64.

A writ of error was then brought in the House of Lords, where it was contended, on the part of the plaintiff, that Mr. Grenville could not, by acknowledging satisfaction on Gerrard's statute, gain any new right to enter, to avoid the fine levied by Edward Lewis above nine years before, by which, and by five years non-claim, his interest in the last extent was barred, because an entry might and ought then to have been made into the extended estate; and the contrary opinion would tend very much to weaken the security of a fine and non-claim, which is the highest and best security in the law for quieting people in their estates, and preventing suits; and it would, therefore, be of very pernicious consequence to all purchasers and owners

of estates, if such old dormant incumbrances were set up against a fine and non-claim, and supported by such a method as the vacating a statute long before extinguished, for, thereby, estates might be incumbered which had been long enjoyed without interruption.

On the other side, it was argued for the defendant, that it was not necessary to make any claim upon Burrows's statute, until Gerrard's statute appeared upon record to be satisfied, and so a claim made by the defendant by entry upon the premises, within five years after satisfaction entered upon record, on Gerrard's statute, was sufficient to prevent Burrows's extent from being barred by the fine. That this case did not differ in reason from the common and known case, where A. tenant for life, remainder in fee to B., is disseised, and the disseisor levies a fine, and there is five years non-claim; though the estate of tenant for life be barred by this five years non-claim, and the remainder-man may, if he please, enter upon the five years non-claim by tenant for life, yet he may wave such entry, and will have a new period of five years after the death of tenant for life, to make his claim; so, although Burrows might, if he had pleased, have entered upon the five years non-claim by Gerrard, yet he might stay and expect until satisfaction was entered upon the record of Gerrard's statute; for, as the death of the tenant for life is the proper and natural determination of an estate for life, so the entering satisfaction upon record is the proper and natural determination of an extent upon a statute; and, in the one case as well as the other, before such determination, the remainder-man or reversioner is not compellable to make his claim to avoid the fine.

The judgment of the Court of King's Bench was affirmed.

17. If there be no person who has a right to make a claim at the time when a fine is levied, and afterwards some person does acquire such a right, he will be allowed five years, from the time when he acquired the right of avoiding the fine, to make his claim.

Stamford's Case, cited Cro. Ja. 61.

18. Thus where a person who was entitled to a term for years in reversion, expectant on another term for years, died; the first term expired, the lessor entered, and levied a fine with proclamations; five years passed before administration was granted of the effects of the person who had the reversionary term.

It was resolved, that the administrator was within the second saving of the statute, and should have five years to pursue his right from the time administration was granted; because till then there was no one who could claim.

19. No person however is within the second saving but he to whom the right of avoiding the fine first accrued; so that those who claim under the person to whom such right first accrued, are only allowed so much of the five years as has not elapsed in the lifetime of their ancestor.

Plowd. 374. 3 Rep. 87 *b.* Jenk. Cent. 6. Ca. 74. Cro. Eliz. 896.

20. Thus it is laid down by the two Chief Justices Dyer and Catline, in the case of Stowell v. Zouch, that if a tenant in tail be disseised, and the disseisor levies a fine, the right of reversing the fine first accrues to, and attaches in, the tenant in tail himself; so that if he lets the five years pass without impeaching the fine, and then dies, his issue will be for ever barred; for they are not within the second saving, because the right first accrued to their ancestor, and not to them. The Justices Southcot and Weston dissented from this opinion, and contended that every issue in tail should have five years, as a new right came to every one of them *per formam doni*; which

right, as they took it, the makers of the act intended to preserve, and to this purpose the words, "by force of any gift in tail," were put in the second saving. But this opinion was utterly disallowed by the Chief Justices, who said that the word *first*, which ought to be added to the word *descend*, and then it would be, *shall first descend*, will not suffer every descent to have five years.

21. Plowden was of opinion that the purview of the stat. 4 Hen. VII. is only against those who have right at the time of the fine levied; or have future right upon cause arising before; and that as to rights accruing after a fine is levied, they are not barred by the statute. This doctrine is nearly transcribed into the Touchstone, where it is said, "Such as have neither present nor future right, at the time of the levying of the fine, by reason of any matter before the fine, but whose right groweth either entirely after, or partly before, and partly after the fine; and these are not barred at all by the fine, but they may make their claim, &c. when they will." 273 *note.* Pa. 22.

This opinion has however been entirely exploded in the following case, in which it was held that no new cause of avoiding a fine can arise after the fine. That every right of avoiding a fine must commence in the party or his ancestor, testator, or intestate, upon a cause existing before the fine was levied; so that no alienation or disposition can be made, which can introduce strangers into the situation of claiming a new title, or cause of entry, or action.

22. R. Browne devised a tenement to his wife Ann, his son Philip, and his daughter Eleanor, for and during the term of the natural lives of the said Philip and Eleanor, and the longest liver of them, and after the decease of the survivor of them the said Philip Goodright v. Forreste 8 East 552

and Eleanor, then the reversion of the said tenement to be to the executors of the said Philip for 40 years. The testator died in 1677, and the reversion in fee of the tenement thus devised, descended to Robert Browne, the eldest son of the devisor. Ann and Eleanor Browne died in 1723, leaving Philip surviving them, who in 1733 levied a fine with proclamations of the said tenement, to William Forrester and his heirs, who thereupon entered. The reversion in fee of the tenement was sold in 1683 to Thomas Burton, who in the year 1735, two years after the fine was levied, made his will and devised the same to Robert Burton for life, remainder to his first and other sons in tail. Thomas Burton died in 1735; and Robert Burton, the devisee for life, died in 1803, leaving issue Robert Burton his eldest son, who in 1805 entered on the premises to avoid the fine, and devised the same to the plaintiff.

The case was argued in the Court of K. B., where judgement was given for the defendant upon a point
Tit. 38. c. 3. that will be stated hereafter. Upon a writ of error in the Exchequer Chamber, the defendant contended
1 Taunt. Rep. that the plaintiff was barred by the fine and non-claim, not having made his entry within five years after the expiration of the term of 40 years, created by the will of Richard Burton. That as the devisee for life under the will of Thomas Burton only died in 1803, it was urged for the plaintiff, that the entry made in 1805 was in good time; but if this were so, it would entirely put an end to the statute of non-claim, for by creating estates for life or in tail, the time might be prolonged *ad infinitum*. But in construing the stat. 4 Hen. VII., it was to be observed that the several particular estates all made only one estate in fee simple. It was clear that if the time began to run against,

the ancestor, it continued to run against the heir or devisee.

Lord Ch. Justice Mansfield said, the Court was unanimously of opinion that the right of entry was confined to five years after the expiration of the 40 years term. The devise was to Philip Browne for life, with remainder to his executors for a term of 40 years. He died in 1738, and the term which then commenced expired in 1778. When the fine was levied, Robert Browne was seised in fee of the reversion; consequently, if he had lived to 1778, he and his heir would have been bound to claim within five years from 1778, in which year the 40 years expired. If he would have been bound to claim within five years from that time, the question was, whether he could by his will give a right to avoid the fine at a more distant period than the end of the five years. If he might, he could equally limit the estate to 500 or 5,000 men in succession, and their heirs in tail, and so keep the right of entry alive for a century or more. This would be the consequence; and a most extraordinary consequence it would be. Whether it can be so, depends upon the words of the statute of fines, which are, "the said proclamations so made, the said fine to be a final end, and conclude as well privies as strangers to the same."

Stopping here, the question was, since a man and his heirs is barred, is a man and his devisees barred? or has the statute of wills this effect, that more time is required to bar a right of entry against a devisee than against an heir, or is not the devisee exactly in the same state as the heir? He had never heard it disputed; and if so, he was barred at the end of five years after the 40 years. But it was said there was a saving of future rights, and every person shall have

five years from the accruer of such future rights. This depended on the words of the statute—"Saving to all other persons such action, right, title, claim, and interest, in or to the said lands, tenements, or other hereditaments, as first shall grow, remain, or descend, or come to them, after the said fine engrossed, and proclamations made, by force of any gift in tail, or by any other cause or matter had and made before the said fine levied; so that they take their action, or pursue their said right and title according to law, within five years next after such action, right, title, claim, or interest to them accrued, descended, remained, fallen, or come." This was confined to persons whose future right first accrued after the fine, by gift in tail, or other cause or matter had and made before the fine levied. Did the title of the lessor of the plaintiff first accrue to him after the fine, as a distinct original title, by matter before the fine? Certainly not. At the time of the fine, T. Burton was seised in fee in reversion, and made his will after the fine levied, in which he devised the premises to Robert Burton for life, with remainder in tail to the lessor of the plaintiff. His title therefore was a part of the same estate, the same fee, which T. Burton had at the time of the fine levied, and which first accrued before the fine. The plaintiff was driven to contend, that the words, "before the fine levied," mean the same thing as after the fine levied. But the lessor of the plaintiff having this estate tail, in order to bring him within the saving, it was said that the case was the same as if he had had it before the fine levied. But to hold this, would be to prevent the statute entirely; and it would have the monstrous consequence, that though the person seised, at the time of the fine levied, must have entered within five years after the 40 years, he

could by his will give his devisee a right of entry for an hundred years. The Court was therefore of opinion that the judgment must be affirmed, because no entry was made within five years after the expiration of the 40 years, which determined in 1778.

23. In consequence of the statute 32 Hen. VIII. c. 28. which will be stated hereafter, a fine levied by a husband alone, of any lands which are the freehold and inheritance of the wife, shall not be prejudicial to the wife or her heirs; but she or they may enter on the lands and defeat such fine. Although the words of this act are very general; yet if the husband levies a fine with proclamations, the wife is bound to enter within five years after the death of her husband; and if she does not, she will not only be barred of her entry, but also of her right; for the object of the statute was only to provide against the discontinuance, which was a grievance peculiar to married women, but not to invalidate fines duly levied, as to married women; they having a remedy in common with others, by entry or claim, to avoid the fine. Besides, though the words of the statute are general—"That such a fine shall not be prejudicial to the wife or her heirs;" yet the following words, "But that she may lawfully enter, according to her right and title therein" are explanatory, and allow her an entry only in those cases where she had a right before the statute.

Married Women within this Saving. Vide Tit. 36.

Dyer, 72 *b.* 224 *a.* 8 Rep. 72 *b.*

infra, c. 12.

24. If a married man levies a fine of his own estate, and five years pass, his wife is not thereby barred of her dower, but is within the second saving of the statute, and will be allowed five years from the death of her husband to make her claim; because her title to dower did not accrue till that period.

373 *n.*

Plowden was of opinion, that in a case of this kind the wife was not bound to make her claim within five years after the death of her husband, but might claim her dower at any indefinite period of time. The contrary, however, was expressly determined in 4 Hen. VIII.; and that determination has ever since been held to be good law.

Damport v. Wright, Dyer, 224. 2 Rep. 93 *a.* Gouldsb. 148.

25. If the wife's title to dower does not accrue at the death of her husband, but commences at a subsequent period, she will be allowed five years from the time when it accrued.

26. A married man levied a fine with proclamations, and was afterwards indicted and outlawed for high treason. Some years after his death, his heirs reversed the outlawry by writ of error, and then the wife claimed her dower.

Menvill's Case, 13 Rep. 19. 2Hawk. P.C. c. 49. § 44.

It was resolved, that although more than five years had elapsed since the death of the husband, yet the fine was no bar to her; because, as long as the attainder for treason stood in force, she could not claim her dower; but as soon as the outlawry was reversed, a title to dower first accrued to her, and therefore she was within the second saving, and had five years from the reversal of the outlawry to pursue her right.

Tit. 6. c. 5. § 2.

27. Although the statute 4 Hen. VII. does not extend to the possessions of the church, yet in case a bishop, dean, vicar, prebendary, or other ecclesiastical person neglects to make his claim within five years after a fine is levied, of an estate to which he is entitled in right of his bishoprick, &c. he will be barred during his life; but his successors are within the second saving, and will be allowed five years to avoid the fine, from the time of their becoming entitled to the lands.

And Bishops, Deans, &c. Plowd. 538. Tit. 31. c. 2. § 50.

28. In the same manner all persons having offices for life, to which lands and tenements are annexed, must make their claim within five years after a fine has been levied of such lands and tenements; otherwise they will be barred during their lives. But each successive officer is within the second saving, and will be allowed five years to avoid the fine, from the time when he becomes entitled to the lands. And Persons having Offices. Plowd. 538.

29. Strangers to fines having several different and distinct rights, by several titles, accruing at different times, shall have several periods of five years allowed them to avoid a fine; that is, five years after the accruing of each title: so that if a right accrues to a stranger, when a fine is levied, which he neglects to pursue within the limited time, and another right accrues to the same stranger, at any time after; he is then comprehended within the second saving of the statute, as to the new right, upon the principle that, *quando duo jura in una persona concurrunt, æquum est ac si essent in diversis.* And Strangers having different Rights.

This construction is certainly not consistent with the letter of the statute; for in consequence of the words, *other persons*, it appears clearly to have been the intention of the legislature, that no person who was comprehended in the first saving, should take advantage of the second saving; and Lord Ch. J. Dyer, in the case of Stowell v. Zouch, contended that this was the true construction of the statute; but, however, the law has always been held to be otherwise. 9 Rep. 105 *b.* Plowd. 372. Cro. Eliz. 220.

30. Tenant for life levied a fine to a stranger; the person in reversion neglected to enter within five years after the fine was levied; afterwards the tenant for life died: Lanud v. Tucker, Cro. Eliz. 254. 3 Rep. 78 *b.*

It was determined that the reversioner should have another period of five years, from the death of the tenant for life, to make his claim; for in this case two distinct rights accrued to him; the first upon the forfeiture which the tenant for life committed by levying the fine, and the second by the acquisition of the reversion, in consequence of the death of the tenant for life.

infra, c. 12.

9 Rep. 105 *b*.

31. It is laid down by Lord Coke, that if a lessee for years is ousted, and the person in reversion disseised, and the disseisor levies a fine with proclamations, both the lessor and lessee are barred, if they do not make their claim within five years after the fine has been levied; and the lessor will not be allowed a new period of five years, after the expiration of the term, to make his claim; because the lessor might have brought an assise or other real action, immediately after the fine was levied; and being thus comprehended within the first saving, he cannot take advantage of the second saving. This doctrine has, however, been since contradicted, and is not now held to be law.

Fermor's Case, 3 Rep. 77. 2 And. 176. Jenk.

32. A lessee for 21 years, who was seised in fee of other lands in the same manor, made a lease for life of all his lands, and levied a fine with proclamations of as many messuages and acres of land as comprehended, not only the lands whereof he was seised in fee, but also the lands which he held for years. He afterwards continued in possession, and paid his rent. Upon the expiration of the term, the lessee claimed the inheritance of the land which he had held by lease, and would have barred the lessor, by means of the fine and non-claim. But it was determined by all the Judges, that the lessor should have a new period of five

years from the expiration of the term, to make his claim, and avoid the fine.

33. This determination is said by Lord Coke to have been founded on the circumstances of fraud which appeared in the case; the principal of which was, that the lessee continued in possession after he had levied a fine, and regularly paid his rent, so that the lessor could have no notice that a fine had been levied of his lands. But in other books the judgement is said not to have been founded on the fraud which appeared in the case, but upon the true construction of the statute. And the doctrine that where a lessee for years makes a feoffment, and then levies a fine, the lessor need not make his claim within five years after the fine has been levied, but is allowed another period of five years, from the determination of the term, was finally established in the following case.

1 Vent. 241, 2. 2 — 334.

34. A lessee for years made a feoffment, and then levied a fine; five years passed; and the question was, whether the lessor was barred by his non-claim during the five years which elapsed immediately after the fine was levied; or should be comprehended within the second saving of the statute 4 Hen. VII. and be allowed another period of five years, from the expiration of the term, to avoid the fine.

Whaley v. Taucred, 1 Vent. 241. T. Raym. 219. 2 Lev. 52. 1 Atk. 571.

The Court resolved that the lessor should have five years from the expiration of the term to avoid the fine; in the same manner as if a lessee for life had levied a fine; the cases being exactly similar.

35. No person who is within the first saving of the statute 4 Hen. VII. can be comprehended within the second saving, unless the second right which accrues to him is different from the first right: for if it is only the same right which accrues a second time,

the nonclaim, during the five years after the right first accrued, will be a good bar.

Salvin v. Clerk, Cro. Car. 156. Sawle v. Clerk, S. C. W. Jones, 208.

36. A tenant in tail made a lease for three lives, which was not warranted by the stat. 32 Hen. VIII. c. 28.; he then levied a fine, and died without issue. Five years passed without any claim by the person in remainder; but on the expiration of the lease he entered.

The Court resolved that he was barred by his non-claim during the five years which elapsed immediately after failure of issue of the tenant in tail; and should not have a new period of five years, after the expiration of the lease; because the lease being void as to him, he had no other title after the expiration of the lease than he had before; for his title arose by the death of the tenant in tail without issue, when he might have brought his formedon.

Of the third Saving.

37. There is a third saving in the stat. 4 Hen. VII. in the following words—"Saving to every person or persons, not party nor privy to the said fine, their exception to avoid the same fine by that, that those which were parties to the fine nor any of them, nor no person or persons to their use, nor to the use of any of them, had nothing in the lands and tenements comprised in the said fine, at the time of the said fine levied."

ante, c. 5. § 21. and infra, c. 14.

38. This clause is merely a confirmation of the old law, by which a fine might be avoided by showing that the parties had no estate of freehold in the lands; but it has been already observed, that it is not necessary for a tenant in tail to be in possession of the estate tail when he levies a fine; and the issue in tail being here described by the word *privy*, are not within this *saving*.

ante, c. 9. § 26.

infra, c. 14.

39. It has been stated that at common law, and also by the statute *de modo levandi fines*, all those who laboured under certain disabilities at the time when a fine was levied, were not affected by it; but they or their heirs might avoid it at any distance of time. This doctrine was altered by the statute 4 Hen. VII. which excepts married women, unless they are parties to the fine, and all persons then being within the age of 21 years, in prison, or out of the realm, or not of whole mind at the time of the said fine levied, not parties to such fine, out of the body of the act. But at the end of the second saving is the following clause respecting them. Exceptions in favour of Infants, &c.

40. "And if the same persons at the time of such action, right, and title accrued, descended, remained, or come unto them, be *covert de baron*, or within age, in prison, or out of this land, or not of whole mind, then it is ordained, &c. that their action, right, and title be reserved and saved to them and their heirs, until they come and be at their full age of 21 years, out of prison, within this land, uncovert, and of whole mind; so that they or their heirs take their said actions, or their lawful entry, according to their right and title, within five years next after that they come and be at their full age, out of prison, within this land, uncovert, and of whole mind; and the same action pursue, or other lawful entry take, according to law."

41. "And also it is ordained, &c. that all such persons as be *covert de baron*, not party to the fine, and every person being within the age of 21 years, in prison, or out of this land, or not of whole mind, at the times of the said fines levied and engrossed, and by this said act afore except, having any right or title or cause of action to any of the said lands and other

hereditaments, that they or their heirs, inheritable to the same, take their said actions or lawful entry, according to their right and title, within five years next after that they come and be of age of 21 years, out of prison, uncovert, within this land, and of whole mind, and the same actions sue, or their lawful entry take and pursue, according to the law; and if they do not take their actions and entry as is aforesaid, that they and every of them, and their heirs, and the heirs of every of them, be concluded by the said fines for ever, in like form as they be that be parties or privies to the said fines."

42. In consequence of these two clauses, all those who labour under any of the disabilities therein specified, either at the time when a fine is levied, or when a right to lands, whereof a fine has been levied, first accrues to them, are allowed five years from the removal of their disabilities to make their claim.

Plowd. 366. 1 Leon. 215.

43. Although the stat. 4 Hen. VII. allows infants five years after they have attained their full age to make their claim; yet an infant may, if he pleases, make his claim before he attains his full age.

Plowd. 366.

44. In the case of Stowell v. Zouch, Brown and Saunders said, that if an infant be in his mother's womb when a fine is levied, such infant will be allowed five years from the time he attains his age of 21 years to make his claim; for though he is not comprehended within the letter of the act, which only mentions infants under the age of 21 years, and therefore does not extend to those who are unborn, yet they are within the intention of the act, and will be aided by the exception.

Plowd. 375. 1 Leon. 215. 2 Atk. 614.

45. It was agreed by the counsel in the same case, that if a person labours under several disabilities at the same time, as if a woman is covert, under age, of

insane mind, and in prison, at the time when a fine is levied, or when a right to lands, whereof a fine has been levied, accrues to her, and one or more of those disabilities are removed, still the five years given by the statute will not commence, till after all her disabilities are entirely removed.

46. It is stated by Plowden, in his report of the same case, that it was affirmed by many of the Judges and denied by none of them, that he heard, that although the persons comprised in the exception were not under such defects or impediments at the time of he fine levied, but became so against their will, after the fine levied, and before the last proclamation, and were in such degree at the time of the last proclamation, they should not be bound to five years next after the last proclamation, but should have five years next after their impediments removed. Plowd. 366.

47. It was also said in the same case by Brown and Saunders, that if a stranger to a fine, who is of sound mind, becomes *non sane*, or is imprisoned, the third year after the proclamations made, and so continues till the five years are expired, and afterwards becomes of sound mind, or is out of prison, he shall not be concluded by the fine: for laches in prosecuting his right cannot be imputed to him who wants liberty or memory; and therefore such person is not comprehended in the intent of the statute. But in this case, if a stranger to the fine, in the third year, had gone beyond sea, or had taken a husband, and so had continued, till the five years were passed, there he should be bound; for the going beyond sea, or taking husband, are voluntary acts; but insanity or imprisonment are involuntary. In a subsequent page it is however said, that if the persons whose impediments are once removed; within a month after, fall into Idem. Id. 375.

any impediments again, and continue so all the five years; the five years before commenced shall proceed, and non-claim within the same five years shall bind the party and his heirs.

48. It has been settled in the following modern case, in conformity to the opinion of Plowden, that when once the five years, allowed to persons labouring under disabilities to avoid a fine, begin, the time continues to run, notwithstanding any subsequent disability.

Doe v. Jones, 4 Term R. 300.

49. In a special verdict it was found, that in Trinity term 1775, a fine was levied of the premises in question, and the last proclamation was made in Easter term 1776. That the lessor of the plaintiff, when the fine was levied and proclaimed, was an infant; but attained the age of 21 in February 1784. That he was then at large in England, and continued so to be till the following December, when he was imprisoned for debt, and detained in prison continually till September 1789, when he made an actual entry on the lands.

The question was, whether the lessor of the plaintiff was barred by his non-claim, during the five years which elapsed immediately after he attained his full age. It was contended on his behalf, that no express adjudication had ever been made on this point, and therefore the Court was at liberty to put such a construction on the statute, as would best answer the intention of the legislature; and consider whether, after the first disability was removed, a second disability arising should stop the progress of the fine during its continuance; in other words, whether the legislature did not intend that the parties included in the exception should have five years, clear from every disability there mentioned, to prosecute their claim. That this question was touched upon in Stowell v.

Zouch; but as there were contradictory *dicta* there by the Judges, the question still remained undecided. In introducing these exceptions, the legislature certainly intended that the parties labouring under the disabilities mentioned, should have the full benefit of the indulgence given them. Every reason which operated for the exception in the first instance, was equally urgent as to any subsequent disability. The act was intended to allow all such persons five years, clear from any of the disabilities mentioned; the words implied as much; and as the act was restrictive of the right which such persons had before, it ought to be construed literally and strictly.

On behalf of the defendant it was argued, that the exception operated only on condition that the party prosecuted his right within five years after the disability was removed; here the disability of infancy was removed in February 1784, and the lessor of the plaintiff made no entry to avoid the fine till September 1789. The five years began the instant he was of age, and continued to run notwithstanding the subsequent imprisonment. That when the disability was removed, the time began and continued to run, was clear from the opinion of the majority of the Judges in Stowell v. Zouch.

Lord Kenyon said, he never heard it doubted, till the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. He was very clearly of opinion, on the words of the statute of fines, on the uniform construction of all the statutes of limitations, down to that moment, and on the generally received opinion of the profession on the

subject, that this question ought not to be disturbed. It would be mischievous to refine and to make nice distinctions between the cases of voluntary and involuntary disabilities; but in both cases, when the disability was once removed, the time begins to run.

Mr. Just. Ashurst and Mr. Just. Grose concurred, and judgment was given for the defendant.

50. The privileges of infancy, coverture, &c. are only given to those to whom a right first accrues, and in whom it first attaches; for if a person to whom a right first accrues, and who is not under any disability, dies before the expiration of the five years allowed him by the statute to make his claim, and such right descends upon his son or heir at law, who is then under age, or labouring under any of the other disabilities mentioned in the statute, still such son or heir must make his claim before the five years are expired, which commenced in the lifetime of his ancestor, otherwise he will be for ever barred; because the right did not first accrue to him, but to a person who was not under any disability.

Stowell v. Zouch, Plowd. 355. Jenk. Cent. 6. Case 74.

51. John Stowell being seised in fee, was disseised by John Zouch, who levied a fine with proclamations. Three years after the fine was levied John Stowell died, without having made any entry or claim to avoid the fine, leaving his grandson and heir at law, Thomas Stowell, the demandant, an infant of the age of six years, who made no claim during his minority, but entered on the lands within one year after he had attained his full age. It was determined by a great majority of all the Judges in the Exchequer Chamber, after many solemn arguments, 1°. That Thomas Stowell being a stranger to the fine was clearly barred by the body of the act, unless he would take ad-

vantage of the exception in favour of infants, &c.; and that he was not within the exception, because it only extends to such infants, &c. to whom a right accrues at the time when a fine is levied: whereas, in the present case, no right accrued to Thomas Stowell at the time when the fine was levied, his grandfather being then living. 2°. That Thomas Stowell was originally within the first saving of the statute, as heir to his grandfather, to whom the right first accrued, being included in the words, "saving to every person and persons and to their heirs;" but not having pursued his remedy within the time prescribed, he could not now take any advantage of the first saving: and with respect to his infancy at the time of his grandfather's death, it could be of no service to him, because the statute only gives the privilege of infancy to those to whom a right first accrues; but where a right first accrues to a stranger who is of full age, and the five years begin to run, if such stranger dies before the expiration of the five years, leaving his heir under age, the heir can have no privilege of infancy, but must make his claim before the expiration of the five years which began to run in the time of his ancestor. 3°. That Thomas Stowell was not within the second saving, which preserves to all *other persons* such right, title, &c. as shall first grow, remain, or descend to them after the said fine engrossed, for several reasons: 1°. Because in consequence of the words *other persons*, this saving only extends to those who are not comprised in the first; and it was not the intention of the act to aid those persons in the second saving, who are comprehended in the first. 2°. The words, first grow, remain, or descend, only extend to the person in whom the right first attaches after a fine

is levied; whereas no new right accrued to Thomas Stowell after the fine was levied, his only title being as heir to his grandfather, in whom the right attached when the fine was levied.

Case of Persons dying under their Disabilities.

52. Where a person to whom a right accrued to lands, of which a fine had been levied, laboured under any of the disabilities specified and excepted in the statute 4 Hen. VII. and died before his disabilities were removed; it was formerly a doubtful point whether the heir of such a person was obliged to make his claim within five years after the death of his ancestor, or was allowed an indefinite period of time for that purpose.

2 Inst. 519. Cro. Eliz. 219. 1 Leon. 211. Sav. 128.

53. This doubt arose from a difference of opinion between Lord Coke and Anderson. Lord Coke, in his report of the case of Sunie v. Howes, states, that Thomas Cotton being tenant in tail of a moiety of certain lands, and tenant for life of the other moiety, with remainder to William Cotton his eldest son in tail, William Cotton went to Antwerp, Thomas Cotton levied a fine with proclamations of all the lands, and William Cotton died soon after at Antwerp, without having ever returned to England, leaving a son named William under age, who entered on the lands.

It was adjudged, that as to the moiety whereof Thomas Cotton was tenant in tail, William the son of William was barred by the statute 4 Hen. VII.; but as to the other moiety, whereof Thomas Cotton was only tenant for life, the entry of William the grandson was lawful, and avoided the fine; for though William the son could not take advantage of the clause which saves the right of those who are beyond sea, provided they made their claim within five years after their return, because William the father never

did return; yet as persons who are out of the realm at the time when a fine is levied, having a present right, are excepted out of the body of the act, which makes the bar; therefore, where a person was beyond sea at the time when a fine was levied, and never returned, he was within the exception made in the body of the act, and his heirs might make their claim at any distance of time.

That it was the same where an infant, not being a party to a fine, and having a present right, died during his infancy, his heirs might make their claim at any distance of time. That the same doctrine took place with respect to a man *non compos*, who died in that situation; or a man in prison, who died before he had recovered his liberty; or a married woman, who died in the lifetime of her husband for all these were within the reason adjudged, of a person who was out of the realm and never returned.

The same doctrine appears to have been laid down by Lord Coke, in his report of Beverley's case. 4 Rep. 125 *b.*

54. In Leonard's report of Cotton's case it is said, the Court held, that as to the moiety whereof Thomas Cotton was tenant for life, the fine was no bar, but that William the grandson might enter at any time within five years after he attained his full age; for William his father was not bound by the statute 4 Hen. VII., because he was beyond sea at the time when the fine was levied, and never returned; but that by the equity of the statute, his issue should be allowed five years to make his claim, from the time he attained his full age. And Anderson, Ch. Just. is reported to have said, that although William the father died beyond sea, yet if his son did not make his claim within five years after the death of his 1 Leon. 211.

father, being of full age, and without impediment, he should be for ever barred.

55. The doctrine here laid down by Lord Anderson has been confirmed by the following determination.

Dillon v. Leman, 2 H. Black. Rep. 584.

56. William Nanton died seised in fee simple of the lands in question, in 1758, leaving Mary Dillon, mother of the plaintiff, his heir at law; upon the death of William Nanton, one Leman entered into the said lands, and became tortiously seised thereof, and being so seised, in Hilary term, 1765, levied a fine *sur cognizance de droit come ceo, &c.* of the said lands, whereupon proclamations were duly had; the said Mary Dillon being under coverture at the time of levying such fine. On the 20th February 1765, the said Mary Dillon died under coverture, leaving the plaintiff, then of the age of 21 years, of sound mind, out of prison, and within this realm, her son and heir. No entry or claim was made on or to the said lands by or on behalf of the said Mary Dillon in her lifetime, nor at any time after, by her husband, nor by the plaintiff, until the year 1787, when the plaintiff made an entry to avoid the said fine: and the question was, whether, on the above case, the plaintiff was barred by the said fine from recovering the said lands.

This case having been sent by the Court of Chancery to the Court of Common Pleas, for the opinion of that Court, and having been twice argued there, Lord Ch. Justice Eyre declared shortly the opinion of the Court, "that the exception in the first branch of the statute 4 Hen. VII., and the proviso at the end of it, were to be taken together; that being so taken, they did not amount so much to an exception as a saving, the true meaning of which was, that the

rights of those persons who were under disabilities, and of their heirs, were saved as long as the disabilities continued, and five years after, but no longer; therefore, that the heir, not being himself disabled, was barred, unless he pursued his right within the five years after it accrued by the death of his ancestor, dying under a disability; and consequently that the plaintiff, in this case, was prevented by the fine from recovering the lands in question." And to this effect was the certificate sent to the Court of Chancery.

TITLE XXXV.

FINE.

CHAP. XII.

Of some other Effects of a Fine.

1. *Sometimes operates as a Release or Grant.*
5. *Sometimes as a Confirmation.*
7. *Is an Estoppel on Record.*
9. *Lets in the Reversion, and makes it liable to Incumbrances.*
11. *Divests Remainders and Reversions expectant on an Estate for Life.*
16. *Discontinues an Estate Tail, and divests the Remainders and Reversion.*
26. *Is a Revocation of a prior Devise.*
27. *Creates a Forfeiture in some Cases.*
37. *A Fine sur Done, Grant, and Render, gives a new Estate.*
38. *And alters the Descent.*

Section 1.

Sometimes operates as a Release or Grant.

THE effect and operation of a fine frequently depends on the particular situation of the cognizor or cognizee, respecting the property of which it is levied. Thus if one joint tenant levies a fine to his companion, it will operate by way of release.

Tit. 18. c. 2. § 28.

2. In the case of Eustace v. Scawen, which has been already stated, the Court held that the fine should enure by way of release.

1 Inst. 200 *b.* *n.* 1.

3. But if one coparcener in tail levies a fine to another, *sur cognizance de droit, &c.* it does not enure by way of release, but by way of grant; and it will be a discontinuance and alteration of the estate, without execution; because one coparcener may enfeoff another, and a fine has the same effect, in this case, as a feoffment.

4. Although a fine may be void as to strangers, on account of the want of a freehold estate in one or other of the parties, yet it may operate as a grant of an estate in remainder or reversion by the cognizee to the cognizor. Rowe v. Power, infra, c. 14.

5. A fine may also operate as a confirmation of a former estate, which was before defeasible. Thus, if a tenant in tail bargains and sells his estate tail in fee, and then levies a fine to the bargainee, the fine will operate as a confirmation of the estate which passed by the bargain and sale. So if a tenant in tail executes a lease not warranted by the statute 32 Hen. VIII. c. 28. makes a mortgage, confesses a judgment, or incumbers his estate in any other manner, and afterwards levies a fine, it will operate as a confirmation of all his prior charges and incumbrances. Sometimes as a Confirmation. Seymour's Case, infra. Ion v. Bull, 2 Roll. Ab. 473.

6. In the same manner, where a tenant for life, and the remainder-man in tail, join in granting a rent-charge in fee out of the land, and afterwards join in levying a fine to another person, the rent, which was before determinable, will be confirmed by the fine. Holbeach v. Sambeach, Winch, 102.

7. A fine being a judgment obtained by consent, in a fictitious suit, and recorded in a court of justice, all those who are parties to it, and their heirs, are for ever concluded from averring or proving any thing against it; and therefore it operates, as to them, as an estoppel on record. Thus, although a fine levied by persons who have no estate of freehold in the lands, is void as to strangers, yet it will operate as an estoppel against all the parties to it. So if two persons are seised in fee, and a stranger levies a fine to them, and to the heirs of one of them, the other will be thereby estopped from claiming any thing more than an estate for life in the lands. Is an Estoppel on Record. Touch. 14.

Tit. 16. c. 8. § 20. Vick v. Edwards, Id. § 10.

8. A contingent remainder may be barred by a fine, which will operate as an estoppel, so as to bind the interest that may afterwards accrue by the contingency.

Lets in the Reversion, and makes it liable to Incumbrances. ante, c. 9. § 49.

Sperling v. Trevor, 7 Ves. 497.

9. The operation of a fine levied by a tenant in tail, who has the immediate reversion in fee in himself, has been already stated: in such a case the reversion becomes liable to the incumbrances of all those who were entitled to it; so that if a tenant in tail, with the immediate reversion in fee in himself, makes a lease, acknowledges a judgment, or incumbers his estate in any other manner, and afterwards levies a fine, it will let in the reversion, and make it liable to all those incumbrances.

Kynaston v. Clarke, Tit. 17. § 30.

10. In the same manner, where a person is tenant for life, remainder to his first and other sons in tail, with the reversion in fee in himself, and becomes indebted by bond, or incumbers the estate in any other manner; if, after the death of such a tenant for life, his son levies a fine, it will let in the reversion in fee, and make it liable to his father's incumbrances.

Divests Remainders and Reversions expectant on an Estate for Life. 1 Inst. 251 *b.* 327 *b.* Hard. 401, 2. Tit. 16. c. 1. § 9.

11. Where a fine is levied by a tenant for life, it operates so as to divest and displace the estates in remainder, and also the reversion. Thus, if A. is tenant for life, remainder to B. in tail, reversion to C. in fee; B. and C. have immediate fixed and vested rights of future enjoyment; that is, estates in *præsenti*, though only to take effect in possession and pernancy of profits at a future period. Now, if A. levies a fine of his life estate, it will divest that right of future enjoyment, leaving only in B. and C. a right of entry, which they must exercise, in order to revest themselves in their former estates.

ante, c. 11. § 18.

12. One of the questions in the case of Goodright v. Forrester was, whether the fine levied by Philip

Browne divested the estate of Thomas Burton the reversioner?

Lord Ellenborough delivered the judgment of the Court. He said, they were all of opinion that the fine divested the estate of Thomas Burton; and that the answer of Mr. Serjeant Williams, viz. "That a remainder-man was not bound, since the stat. 4 Hen. VII. to look to his estate, till the determination of the preceding estates," was not satisfactory; for though that statute prevented the laches of antecedent remainder-men from prejudicing those who followed, as it did before the statute of non-claim, 34 Edw. III. yet it had not preserved the right of the subsequent remainder-men, by at all altering the immediate effect of the fine upon the remainders; but by giving all the remainder-men rights of entry, within five years after their respective titles should accrue, and thereby preventing their rights from depending on the conduct of the person whose right of entry accrued immediately on the forfeiture. And their opinion was, that the effect of Philip Browne's fine was to divest the estate in reversion of Thomas Burton, leaving in him only such right of entry as the forfeiture incurred by reason of the fine authorized him then to exercise; and if that should not be thereupon presently exercised by him, leaving in him a future right of entry, to be exercised within five years after the determination of the estates for life, and of the remainder of the term of forty years.

ante, c. 8. § 17.

13. It was resolved in Margaret Podger's case, that if tenant for life accepts a fine from a stranger, it does not divest the estate of him in reversion or remainder.

9 Rep. 106 *b.* 1 Vent. 257, 8.

14. It was also held in a modern case, that where a tenant for life levied a fine, and afterwards devised the premises, and died seised, the entry and con-

tinuing possession of the devisee, was no disseisin of the reversioner.

William v. Thomas, 12 East. 141.

15. Anne Evans being tenant for life of the premises in question, levied a fine thereof in 1792, and died in 1808, having previously made her will, by which she devised them to the defendant Thomas, who upon her death took possession of the same, under the will, and so continued in possession till the time of bringing the action.

It was contended, in bar to the ejectment, that the fine was a forfeiture of the estate for life, and that the entry and possession of the devisee amounted to a disseisin, otherwise there could be no disseisin committed in the present times.

Lord Ellenborough said, that no act had been done by the defendant to make a disseisin. The lessor of the plaintiff never was in possession, and therefore could not be disseised or put out of possession. It did not even appear that the defendant was cognizant of the claim of the lessor. Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee, as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the lord's court. But no act of notoriety was stated to have been done by the defendant, as claiming to put himself in the place of the rightful freeholder. It would be carrying the doctrine of disseisin further than any other case had done, to say that the mere taking of the rents and profits, as devisee of the land, was a disseisin, without meaning to do this adversely to the party entitled; for it did not even appear that when he entered he knew of the lessor's claim.

Judgment was given for the plaintiff.

Discontinues an Estate Tail, and di-

16. It has been already stated, that an estate tail may be discontinued; and the nature and effects of

a discontinuance have been also explained. A fine is one of those assurances by which an estate tail may be discontinued; and the estates in remainder, as also the reversion, divested and turned to a right; so that the remainder-man or reversioner is barred of his entry, and has only a right of action left. For though the statute *De donis* says, *et si finis super hujusmodi tenementum in posterum levetur, ipso jure sit nullus*; yet these words were only held to extend to the right of the issue in tail, and not to their possession.

vests the Remainders and Reversions. Tit.2.c.2.§ 6. Tit.29.c.1. § 13. Lit. § 597. 1 Inst.327 *a.*

17. An estate tail is not discontinued unless the remainder or reversion be discontinued; and therefore if the reversion or remainder be in the Crown, the tenant in tail cannot by fine discontinue his estate.

Tit.2.c.2.§8.

18. A fine may either operate as a discontinuance in fee, or only for a particular period, according to the nature of the estate from the creation of which the discontinuance arises.

19. A tenant in tail levied a fine, to the use of I. S. for the life of I. S. with warranty; he afterwards levied a fine to the use of himself and his heirs, with warranty; and after that, bargained and sold to another and his heirs.

Hunt v. Bourne, 2 Salk. 244.

It was held by Lord Holt and Just. Powell,—

1st, That the first fine made a discontinuance; but it was only a discontinuance for the life of I. S., because the wrongful estate that caused the discontinuance was only an estate for his life, and the discontinuance could remain no longer than that estate.

2dly, That the second fine could not enlarge the discontinuance, because the estate raised by the fine returned back to the cognizor, and consequently the warranty which was annexed to it was extinguished;

and it would be a vain thing to make a discontinuance for the sake of that warranty, which was destroyed in its creation.

3dly, That supposing the second fine had been levied to R. S. a stranger, yet during the life of the first cognizee, this second fine made no discontinuance; because the estate was turned to a right by the first fine, and the second fine could not turn it more to a right; so as it was not a present or an immediate discontinuance: but if the first cognizee died in the life of the tenant in tail, then it would become a discontinuance; for the new reversion which the tenant in tail gained, and to which the warranty was annexed, was executed in possession in R. S., and there was no right of entry or action in any body when the estate was executed; for the tenant in tail could not enter, and the issue had no right. And they compared it to Littleton, § 620. 622.

20. Where the original conveyance of an estate tail is not by fine, but it is only levied as a confirmation of some prior conveyance, it will not in that case operate as a discontinuance of the estate tail, or take away the entry of the remainder-man.

Seymour's Case, 10 Rep. 95.

21. Lord Cheney being tenant in tail, with remainder in tail to John Cheney, conveyed the premises by bargain and sale enrolled, to William Higham and his heirs, by force whereof he entered and was seised: and in a year afterwards, he levied a fine with proclamations to the said Higham and his heirs, with general warranty. Lord Cheney died without issue; upon which John Cheney, the remainder-man in tail, entered upon the premises; and the question was, whether his entry was lawful?

It was resolved, that the entry of John Cheney was not taken away by the fine, because it did not dis-

continue the estate tail, but only operated as a confirmation of the estate of the bargainee, which was originally determinable on the death of the tenant in tail; whereas the fine confirmed it, as long as the tenant in tail had heirs of his body. It was agreed, that if the fine had been levied before the bargain and sale was executed, it would have discontinued the estate tail, by which means the entry of John Cheney would have been taken away; but the estate tail not being discontinued, the remainder was not turned to a right.

22. But where a fine is levied in pursuance of a covenant, in a prior conveyance of an estate tail; as where a tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly; in that case the lease and release and fine will be considered as one assurance, and will therefore operate as a discontinuance of the estate tail.

23. A person being tenant in tail male, with remainder over in fee, in consideration of marriage, conveyed his estate, by lease and release, to trustees and their heirs, to several uses; and in the release he covenanted to levy a fine to the same uses. The marriage took effect, and the tenant in tail levied a fine, in pursuance of his covenant. Afterwards the tenant in tail died without issue, and the remainder-man made an actual entry upon the lands to avoid the fine, and then brought an ejectment. The question was, whether the remainder-man had a right of entry? It was contended that the entry was lawful, unless a discontinuance of the estate tail could be proved. That from the authority of Seymour's case the fine did not operate as a discontinuance, because it passed no freehold, the freehold having been conveyed by the

Doe v. Whitehead, 2 Burr. 704.

lease and release, before the fine was levied, which therefore only operated as a confirmation of the preceding estate.

The Court was, however, unanimously of opinion, that the lease and release and fine operated as one assurance, and discontinued the remainder in fee, by which it was turned to a right, so that the plaintiff had lost his right of entry, and was put to his writ of formedon; because the operation of the deeds and fine ought not to be divided and considered distinctly, as that would defeat the intention of the parties, and overturn a great number of family settlements. That the deeds of lease and release were incomplete until the fine was levied, and only operated as a declaration of the uses of the fine, so that the estate tail passed by the fine. And this case was quite different from Seymour's; for in that case Lord Cheney did not levy the fine until a year after the bargain and sale was enrolled; and it was expressly found by the verdict, that the bargainee entered, and was seised by force of the bargain and sale only; so that the bargain and sale was totally unconnected with the fine, nor did it appear that any fine was intended to be levied at the time when the bargain and sale was executed.

Tit. 2. c. 2. § 5.

24. It has been stated that there can be no discontinuance of things lying in grant. So that if a tenant in tail of a rent, advowson, or common, levies a fine of such rent, &c., there is no discontinuance.

3 Rep. 89 *b.*
9 — 106 *b.*

25. It is laid down by the Judges, in the Case of Fines, that if a tenant in tail accepts a fine from a stranger, it does not discontinue the estate tail, but after his death the issue may enter.

Is a Revocation of a prior Devise.

26. A fine will in general operate as a revocation of a prior devise of the lands whereof the fine is

levied. The reason of which will be stated in Title XXXVIII. *Devise.*

27. Where a person, who is only tenant for life, levies a fine *sur cognizance de droit come ceo*, &c., it will operate as a forfeiture of his estate: because it is an attempt to create a greater estate than he can lawfully convey, and a renunciation of the feudal connexion between the tenant and his lord. So if a tenant for life accepts a fine *sur cognizance de droit*, &c., it is also a forfeiture of his estate for life; for it is a denial of tenure upon two accounts: first, in admitting the reversion to have been in a stranger to convey; and, secondly, in accepting of it himself, to the prejudice of the person in reversion.

Creates a Forfeiture in some Cases. Tit. 3. c. 1. § 32. 1 Inst. 251 *b.* Gilb.Ten.38. 9 Rep. 106 *b.*

28. If A. be tenant for life, with remainder to B. for life, and A. levies a fine to B.; this is a forfeiture of both their estates: for by their own act on record they have denied the reversion to be in the lord; the one by giving, and the other by receiving it.

Smith v. Abell, 2 Lev. 202. Co. Read. 3.

29. A. was tenant for life, remainder for life to B., remainder in tail to C., remainder to B. in fee. B. levied a fine *sur cognizance de droit*, &c. to a stranger. It was adjudged to be a forfeiture of his estate in remainder for life; so that, after A.'s death, C. might enter, because the fine transferred a fee simple in possession by estoppel, against which he could not aver that he only passed an estate for life *in præsenti*, with a fee simple expectant on the death of C. without issue; for the fine supposed a prior gift in fee simple, which he could not lawfully make, while the estate for life of A. and the intermediate remainder of C. in tail, were subsisting.

Garrett v. Blizard, 1 Roll. Ab. 855.

30. But where the person who has the next estate of inheritance joins with the tenant for life in levying a fine, it does not then operate as a forfeiture.

Bredon's Case, 1 Rep. 76. 1 Vent. 160.

31. A. being tenant for life, with remainder in tail to B., they both joined in levying a fine *sur cognizance de droit come ceo*, &c. to a stranger in fee.

It was resolved, that this was neither a discontinuance nor a forfeiture, but that each of the parties to the fine gave that which he might lawfully dispose of; and that the law would construe it to be, first, the grant of the person in remainder, and, afterwards, the grant of the tenant for life.

1 Inst. 251 *b.* 1 Roll. Ab. 852.

32. If a tenant for life of a rent or advowson levies a fine of them, it will create a forfeiture; for although in this case the fine passes no more than it lawfully may, yet, being a public and solemn renunciation of the estate for life, in a court of record, it is within the reason of the law, and amounts to a forfeiture.

Pigott v. Salisbury, 2 Mod. 109.

33. A fine *sur concessit*, levied by a tenant for life, does not operate as a forfeiture of his estate, because it only transfers such an interest as the tenant for life may lawfully pass, without divesting or displacing the estates in remainder or reversion.

1 Inst. 251 *b.*

34. Although a fine *sur conuzance de droit*, &c. levied by a tenant for years, does not create any bar, yet it will operate as a forfeiture of the term; but a fine *sur concessit* will not have this effect.

Tit. 8. c. 2. § 50.

2 P. Wms. 146. 3 Atk. 729.

35. No fine levied by a *cestui que trust* for life will be allowed in Chancery to operate as a forfeiture, because it cannot affect the subsequent remainders; and therefore such a fine will, in equity, operate, at most, as a grant of the interest of which the *cestui que trust* has a power to dispose.

Co. Sup. c. 11.

36. If a copyholder levies a fine of his copyhold, it will operate as a forfeiture; and in such a case, no acceptance of rent, or other act done by the lord, will be available to make the estate good. It is,

however, said, in a modern case, that this doctrine is too general; for unless there is a change of possession, the fine will be void against the lord. Doe v. Helier, 3 Term R. 162.

37. It has been shown, that in a fine *sur done, grant, and render*, the cognizee is but an instrument, who has a seisin only for an instant, which is not sufficient to entitle his wife to dower; yet it has been adjudged, that this species of fine operates as a feoffment and re-enfeoffment, and therefore gives a new estate. A Fine sur Done, Grant, and Render, gives a new Estate. ante, c. 3. § 30.

38. In consequence of this doctrine, if a person, seised of an estate *ex parte materna*, levies a fine *sur done, grant, and render*, and takes back an estate to himself and his heirs, the nature of the descent is thereby altered, and the estate will afterwards descend to the heirs *ex parte paterna*. And alters the Descent. Tit. 29. c. 3. § 49.

39. I. S. being seised of lands *ex parte materna*, he and his wife levied a fine to I. N. and I. B., and they by the same fine granted and rendered the same lands to the use of the said I. S. and his wife, and the heirs of their two bodies, remainder to the right heirs of I. S. The husband and wife died without issue; and the question was, whether the remainder descended to the heirs on the part of the mother, or on the part of the father. Price v. Langford, 1 Show. 92. 1 Salk. 337. Carth. 140. Holt, 253.

It was argued on the one side, that this seisin of the cognizee was merely fictitious; for if the cognizee had a term for years in the land, it would not be merged: that it was like the case of a surrender of a copyhold into the hands of the lord, who was thereby only a mere instrument: therefore, that nothing was altered by the fine, but the estate remained as before.

On the other side it was insisted, that the cognizee could not render the estate, unless he had it in him;

and that the grant and render operated as a feoffment and re-enfeoffment.

The Court held, that the estate was once in the cognizee, otherwise he could not give it back; that the grant and render was a conveyance at common law, and made the cognizor a new purchaser, as much as a feoffment and re-enfeoffment: so that the remainder descended to the heirs on the part of the father.

40. It is observable, that this is the only sort of fine which gives a new estate; for if a person seised *ex parte materna* levies a fine *sur cognizance de droit*, &c., and either makes no declaration of the uses of it, or declares it to be to the use of himself and his heirs, the lands will still descend *ex parte materna*; because it is the old use, which, consisting in trust and confidence, will follow the nature of the land, and will descend as the land would have descended, if no alteration had been made; and it is totally immaterial whether the use be expressly declared on a fine of that kind, or permitted to arise by implication.

TITLE XXXV.

FINE.

CHAP. XIII.

What Persons, Estates, and Interests are not barred by a Fine.

1. *The King.*
3. *Ecclesiastical Corporations.*
5. *Estates not divested.*
12. *Or where the Possession is not adverse.*
15. *Future Interests:*
22. *A Rent, Right of Way and Common.*
24. *Estates in Dower and Jointures.*
25. *Estates held* Jure Uxoris.
26. *Estates Tail of the Gift of the Crown for Services.*
27. *Reversions in the Crown.*
29. *Springing and shifting Uses.*
31. *Dignities.*
32. *Mortgages, &c.*

SECTION 1.

NOTWITHSTANDING the great force and effect of a fine, yet there are some particular persons, estates, and interests, to which its operation does not extend.

The King.

2. By the common law, no laches can be imputed to the King; and therefore no delay or omission on his part, in making a claim, will bar his right. From thence has arisen the maxim, *Nullum tempus occurrit regi*; for the law supposes his Majesty to be always busied for the public good, and therefore that he has not leisure to assert his rights within the time prescribed for other persons. It follows, from this

1 Inst. 41 *b.*

principle, that the King cannot be barred by a fine to which he is not a party, nor is the royal prerogative in this instance taken away by the statute 9 Geo. III. c. 16.

Tit. 31. c. 2. § 59.

Ecclesiastical Corporations.

3. Ecclesiastical corporations, and in general all ecclesiastical persons, who are seised in right of their churches only, and have not an absolute estate in their possessions, being restrained from alienation by several statutes, are not only prohibited from levying fines, but cannot even bar their successors by their non-claim.

Magdalen College Case, 11 Rep. 78 *b.* 1 Roll. Rep. 151. Watson, 427.

4. Thus, in a case in 13 Ja. I. where a fine and five years non-claim was set up in bar to an ejectment, brought by the Master and Fellows of Magdalen College, one of the points was, whether the Master and Fellows were barred by the fine and non-claim: and it was resolved, that the right of the College was not barred; for the words of the stat. 13 Eliz., which prohibits all ecclesiastical corporations from alienation, were, "That all leases, gifts, grants, feoffments, conveyances, or estates, to be made, had, or suffered by any master and fellows of any college, &c. to any person or persons, &c. (except leases), shall be utterly void and of none effect, to all intents, constructions, and purposes." So that when a fine was levied, and no claim was made for five years, there was a conveyance permitted and suffered by the master and fellows of the college; and it would have been of no effect to have prohibited the master and fellows themselves from making conveyances of their lands, if they were allowed to have a power, by their permission and non-claim, to bar their successors.

Howlett v. Carpenter, 3 Keb. 775. S. P.

ante, c. 11.

A bishop, dean, or vicar, may, however, be him-

self barred by his own non-claim, as has been stated in a former chapter.

Estates not divested.

5. It is a rule of law, that no estate or interest can be barred by a fine, unless it is divested out of the real owner, either before the fine is levied, or by the operation of the fine itself: that is, unless the real owner is put out of possession of such estate or interest; and that while he continues in possession, a fine will not affect him.

5 Rep. 123 b.

This doctrine is stated *arguendo* in Saffyn's case in the following words: "No fine levied with proclamations shall bind any but those who are put out of possession, and have but a right; for if their estate or interest be not divested out of them, but remains in them as it was *ab initio*, they need not make an entry or claim to that which never was divested."

9 Rep. 106 a.

6. Lord Coke states the second resolution in Margaret Podger's case thus: "That no fine nor warranty shall bar any estate in possession, reversion, or remainder, which is not divested and put to a right; for he who has the estate or interest in him cannot be put to his action, entry, or claim, for he has that which the action, entry, or claim would vest in him or give him."

There is a considerable inaccuracy in this passage, if the words "divested and put to a right" are understood conjunctively, and in that strict technical sense which the law annexes to them. The word "divest" signifies nothing more than a mere deprivation of the possession*. But the words, "put to a right," have a much more extensive signification, as they mean a de-

* Divest, *devestire*, is contrary to invest; for as *investire* signifies *possessionem tradere*, so *devestire* means *possessionem auferre*.

COWELL's *Dict.*

privation, not only of the possession, but also of the right of possession; for where an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property. If therefore the above passage be taken strictly, it will appear to be unsupported by any authority; for though it may be necessary that an estate be divested, before it can be barred by a fine; yet it is by no means necessary that it should be put to a right.

Tit. 29. c. 1. § 12.

ante, c. 11. § 51.

7. Thus in the case of Stowell v. Zouch, when Stowell was disseised by Zouch, his estate was merely divested; that is, he had only lost the actual possession; but it was not turned to a right, for he still continued to have in him both the right of possession and the right of property; and yet all the Judges agreed that he was barred by the fine and non-claim.

8. The rule of law therefore clearly is, that no person can be barred by a fine, unless his estate is divested, *or* turned to a right; and he has only a right of entry, or a right of action, left in him; and where an estate is turned to a right, it is necessarily divested, though not *e contra*.

Focus v. Salisbury, Hard. 400.

9. A person who was seised in fee, for the continuance of his estate in his name and family, made a lease for 500 years to a trustee, in trust that he himself should receive the profits during his life, and that afterwards his brother should receive them. Some time after, the lessor, being in possession according to the trust, covenanted with other parties, for the same considerations, to stand seised of those lands to the use of himself for life, remainder to the use of his brother, &c., and that the said lease and all other estates made or to be made by him should be and enure to the same uses, and then levied a fine to the uses of that deed.

A question arose, whether the term of 500 years was barred by the fine and non-claim. Lord Hale observed, that nothing had been done whereby the estate of the lessee was divested or displaced; for the lessor continuing in possession, by permission of the lessee, as must be presumed, he was only tenant at will to the lessee, and therefore his fine had no operation.

10. If a person who has made a lease to trustees, and has still continued in possession, makes another lease of the same lands, and levies a fine to confirm it, the first lease will be divested by the second, so that it will then be barred by the fine.

11. The Marquis of Winchester made a lease for 100 years, in trust to attend the inheritance; the lessee entered; and then the Marquis entered and received the profits, and afterwards made a lease for 54 years, and covenanted to levy a fine to confirm it, which he levied accordingly, and five years passed without any claim by the first lessee. Freeman v. Barnes, 1 Vent. 55. 1 Lev. P. 1. 270.

It was adjudged by the Court of C. B. and affirmed by the Court of K. B. upon a writ of error—1°. That when the Marquis entered on the lessee for 100 years, he became tenant at will to him, to which estate it was not always requisite that there be the express consent of both parties, but if there was any thing tantamount it was sufficient, as here the trust implied that the lessor should take the profits, being the *cestui que trust*, which included at least an estate at will.

2°. That when the Marquis made the lease for 54 years, though this was not a disseisin, because the reversion was in the lessor himself, who made the lease, yet by this, the lease for 100 years was divested, displaced, and turned to a right.

3°. That being so divested, it was barred by the fine and non-claim.

Or where the Possession is not adverse.

12. It is not only necessary that a person should be out of possession, to be affected by a fine; but it is also requisite that the party levying the fine should have an adverse possession, inconsistent with that of the person to be barred; so that if the possession of the person who levies a fine be consistent with that of any other person, such other person will not be affected by it.

Ford v. Grey, 6 Mod. 44. 1 Salk. 285. Tit. 31. c. 2. § 23.

13. Thus it has been settled that the possession of one joint tenant is the possession of the other, so as to prevent the effect of the statute of limitations; and that where there are two joint tenants in fee, if one of them levies a fine of the whole, it does not amount to an ouster of his companion, but only severs the joint tenancy, though he is in of the old use again.

Tit. 19 & 20.

14. The possession of one coparcener, or of one tenant in common, is the possession of the other; nor does the bare perception of all the rents and profits by one, amount to an ouster of the other, so as to make him liable to be barred by a fine.

Future Interests.

15. In the case of future interests, such as estates in remainder and reversion, although the persons entitled cannot be put out of possession, yet as they have vested interests, such interests may be divested; and it has been already shown, that estates in remainder and reversion may be divested, so as to leave only a right of entry in the persons entitled to them, when the prior estates determine; in which case they may be barred by fine. But where estates in remainder and reversion are not divested, a fine has no operation on them.

ante, c. 12.

Podger's Case, 9 Rep. 104.

16. A copyhold estate was granted to John Podger, and Mary and Elizabeth his daughters, for three

lives. The lord of the manor, by deed indented and enrolled, bargained and sold the lands to John Podger in fee, who having thus acquired the freehold, levied a fine thereof with proclamations, and died two years after; whereupon the estate descended to his son Marmaduke. Ten years after the death of John Podger, Elizabeth Podger entered; and it was adjudged that her entry was lawful, for her estate in remainder not being divested, the fine had no effect on it.

17. In Saffyn's case it was agreed, that although a term for years might be barred by a fine, if the lessee were or might have been in possession, yet that so long as a lessee for years had only an *interesse termini*, or future right, he was not affected by a fine. But when his term commenced, and he acquired a right to enter on the land, he then had such a present estate as might be divested, and which he might revest by entry; so that his non-claim for five years after the commencement of his term barred him, because from that time he was out of possession. note c. 10. 5 Rep. 124*b*.

18. A person limited lands to the use of himself for life, and if he should settle a jointure on his wife, and make a lease for 81 years, to commence after his death, that then the trustees should stand seised to such uses. He made a lease accordingly, and then he and his wife levied a fine. Edwards v. Slater, Hard 410.

It was resolved that the lease was not barred, because being a future interest, it was not divested or displaced by the fine.

19. In the case of Corbet v. Stone, Lord Ch. B. Gilbert observes, that judgment was given for the plaintiff, which proved that the grantee had an interest, and that this interest was not barred by a fine and five years non-claim after the death of the Tit. 16. c. 3. § 12. 5 Bac. Ab. 240. 8° ed.

grantor; not being touched, divested, or turned to a right.

ante, c. 10. 1 Mod. 217.

20. The interests of tenants by statute merchant, statute staple, and *elegit*, cannot be barred by a fine, until they have extended the lands, or pursued their rights in some other manner; for until then they have no right to enter on the lands, and therefore cannot be put out of possession.

1 Cha. Ca. 268. 1 Freem. 211.

21. So where a person has a judgment for debt, and the debtor before execution aliens by fine, and five years pass, yet the creditor may still sue out execution.

A Rent, Right of Way and Common, 5 Rep. 124 *a*. Cro. Ja. 60. T. Raym. 149. Touch. 23.

22. Although the owner of a rent may bar it by fine, yet a rent in the possession of a third person cannot be so barred. It is the same of a right of way, or common; because these being merely incorporeal rights, collateral to and issuing out of lands, they cannot be divested; for though a person who has a rent, right of way, or common, out of lands, be not in the actual enjoyment of them, yet by non-user only for a time, he does not cease to have a vested estate or interest therein; so that he still continues to be in actual possession. Such things being mere creatures of the law, and owing their existence to the construction thereof, they are always considered to be in the possession of those whom the law adjudges to have a right to them.

Tit. 23. 24. & 28.

These principles have been confirmed by the Court of K. B. in the following case.

Mich. 23 G. 3. Goodright v. Board & Jones, MS.

23. In an ejectment for lands in Surry, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case. Lord Bolingbroke, being seised in fee of the premises in question, by indenture of lease, dated the 1st March 1765, demised the same to William Stevens for twenty-one years, at

the rent of 100*l.*; which lease, by mesne assignments, became vested in the defendant Board. Lord Bolingbroke, by a bond dated 24th July 1770, with warrant of attorney to confess judgment, in consideration of 3,000*l.* became bound to the lessee of the plaintiff in the penal sum of 6,000*l.*, conditioned for the payment to her of an annuity of 500*l.* during his own life; and by indenture of the same date, Lord Bolingbroke, in consideration of the said 3,000*l.* and as a farther security for the annuity, demised the premises in question to the lessor of the plaintiff for ninety-nine years, if he should so long live, at a pepper-corn rent, with a proviso, that the lessor of the plaintiff should the next day re-demise the premises to Lord Bolingbroke for ninety-eight years and eleven months, if he should so long live, at the rent of 500*l.*, which was accordingly done. Lord Bolingbroke, by lease and release dated the 9th and 10th March 1773, conveyed the premises, for a fair and valuable consideration, to the defendant Jones in fee, who had no notice of the annuity granted to the lessor of the plaintiff. Jones being in possession, levied a fine of the premises, with proclamations, in Trinity term 1775, to the use of himself in fee. The annuity was in arrear from the 24th January 1774, and the ejectment was brought in Hilary term 1782.

Lord Mansfield.—We have looked into all the cases, and have no doubt. It appears that the lessor of the plaintiff, and the defendant Jones, are both innocent: Jones is a purchaser for a valuable consideration, without any notice of the lessor of the plaintiff's title; the lessor of the plaintiff is not alleged at any time to have known of the conveyance to Jones; and there was no circumstance of notoriety attending the transfer to give her such notice; for the visible possession continued the

same after the sale as before it; the lease to William Stevens subsisting, and the payment of rent to Jones, instead of Lord Bolingbroke, carried with it no notoriety in the country. At the time of the conveyance there was no arrear of interest due to Mrs. Hare, and therefore she had no right to come upon the land in any shape. If she was guilty of laches afterwards, there could be no *mala fides* in it with respect to Jones, as he is under no disadvantage from it: so that it is a question of mere law between two innocent parties, whether the right and interest of the lessor of the plaintiff is barred by the fine and non-claim. This depends on one clear proposition, which is a general rule of law founded in good sense; and although it be difficult to find a rule without an exception, yet I know of none to this proposition. It is laid down in 9 Co. Rep. 106 *a*. "Resolved *per totam curiam*, that no fine nor warranty shall bar any estate in possession, reversion, or remainder, which is not divested and put to a right." This general rule is illustrated and applied to several cases throughout the books; and hence it follows, that no collateral interest can be barred by a fine; as a rent-charge, a right of common, &c.: and the authority cited from Carter, 24, that a rent-charge may be barred by a fine, is totally mistaken; for, in looking into it, it appears to be thus: the owner of a rent-charge levied a fine of the land; the question was, whether the rent-charge passed by the fine; and a distinction was taken between a fine operating as a grant or as a bar. Here the fine operated as a grant, and not as a bar; the rule is universal, that a rent-charge in a third person is not barred by a fine and non-claim. Hence the parties to a fine, or one of them, must be in of a seisin or possession adverse to that interest which is to be barred; for, if

it be consistent with it, the fine does not divest it, and therefore is no bar. Now, at the time of the conveyance to Jones in 1773, Lord Bolingbroke had no adverse possession: he had paid all arrears; and as the lessor of the plaintiff had no right to come on the land but for arrears, she had then no title in her. At the time when the fine was levied, there was an arrear of a year and a half due; but the lessor of the plaintiff was not bound to resort to the lands for her remedy, she had other securities; besides, she could not enter on the lands, the lessee for years being in possession; all she could do was by notice to the tenant under the statute 4 & 5 Ann. c. 16. which makes attornment unnecessary, either to distrain or bring an action for the rent. In every shape it is most clear, that the lessor of the plaintiff's interest was not divested or turned to a right; and therefore that it remained after the fine just as it did before. Judgment was given for the lessor of the plaintiff.

Estates in Dower and Jointures.

24. Where women having an estate in dower, or a jointure, discontinue or alien them, such discontinuances or alienations are declared to be void, by the statute 11 Hen. VII. c. 20.: and by the statute 32 Hen. VIII. c. 36. § 2. it is declared, that no fine levied by a woman of any such estate as is mentioned in the statute 11 Hen. VII. shall be of any effect.

Estates held Jure Uxoris.

25. By the statute 32 Hen. VIII. c. 28. § 6. it is declared, that no fine levied by a husband of any lands, whereof he is seised in right of his wife, shall be prejudicial or hurtful to the wife or her heirs.

The cases which have arisen on these statutes will be stated in Title *Recovery*. c. 10.

Estates Tail of the Gift of the Crown for Services.

26. It has been stated in chapter ix. that estates tail, of the gift of the Crown, may be barred by the stat. 4 Hen. VII., though excepted out of the stat. 32 Hen. VIII. But by a subsequent statute, a distinction is made between estates tail of the gift of the Crown generally, and estates tail granted by the Crown as a reward for services; and these last are protected from the operation of the stat. 4 Hen. VII., as well as from that of the stat. 32 Hen. VIII., of which an account will be given in Title *Recovery*.

c. 10.

Reversions in the Crown. 1 Inst. 372 *b*.

27. When fines became common assurances of lands, the Judges would no more allow a fine to divest the interest of the King, than any other conveyance, but preserved the King's remainder or reversion, though they allowed the fine to bar the person levying it, and his issue; so that where a fine is levied of an estate tail, whereof the remainder or reversion is in the King, it creates a base fee, determinable on failure of heirs of the body of the tenant in tail.

Mulgrave v. Mounson, 2 Freem. 17.

28. It was held by Lord Nottingham, assisted by Lord C. J. North and J. Jones, that where there is tenant in tail of the gift of the King, with a remainder in the Crown, such tenant is not restrained by the stat. 34 Hen. VIII., but might levy a fine to the Crown which would bar his issue; for it appeared by the preamble of the statute, that it was made to prevent the alienation by tenant in tail, that the memory of the King's bounty might be preserved; and where the estate comes wholly back to the King, there it is in the King's power to preserve the memory of his bounty, either by giving it back to the same party, or what other way he pleaseth.

Springing and shifting Uses.

29. A springing or shifting use cannot be defeated or destroyed by a fine levied of the estate out of which such springing or shifting use is to arise.

30. Thus in the case of Lloyd v. Carew, which has been stated in a former title, it appeared that Richard Carew and Penelope his wife, in order to extinguish and destroy all such right as the heirs of Penelope might have under the proviso, and for settling the same on R. Carew and his heirs, levied a fine of all the estate, and declared the uses thereof to R. Carew for life, remainder to Penelope for life, remainder to R. Carew in fee. R. Carew died without issue, upon which the heirs of Mary claimed the estate under the proviso, and filed their bill in Chancery, to compel the trustees to convey the estate to them, on payment of the 4,000 *l.* Tit. 16. c. 5. § 31.

The bill was dismissed; but upon an appeal to the House of Lords, the decree of dismission was reversed, it being alleged that the fine could not bar the benefit of this proviso, because the same never was nor could be in Penelope, who levied the fine.

31. A dignity or title of honour cannot be barred or surrendered by fine, as has been already shown. Dignities. Tit. 26. c. 2. § 25.

32. There are several cases in which a court of equity will not allow a fine to have any effect on estates in mortgage and trust estates, of which an account will be given in the next chapter. Mortgages, &c.

TITLE XXXV.

FINE.

CHAP. XIV.

How Fines may be reversed and avoided.

1. *Writ of Error.*
5. *Who may bring it.*
11. *Against whom.*
12. *What may be assigned for Error.*
18. *The Parol demurs for Infancy.*
20. *Manner of Reversal.*
22. *Must be brought within Twenty Years.*
24. *How it may be barred.*
30. *Writ of false Judgment.*
31. *Writ of Deceit.*
35. *Motion.*
37. *Modes of avoiding the Effects of a Fine.*
38. *Real Action.*
42. *Actual Entry.*
54. *Must be followed by an Action.*
55. *Plea that the Parties had no Estate, &c.*
64. *Averment of Fraud.*
69. *Courts of Equity.*

SECTION 1.

Writ of Error.

A FINE being considered as a judgment given in a court of record, it can only be reversed by a writ of error; which is also a matter of record, being a commission to Judges of a superior court, authorizing them to examine the record upon which a judgment was given, and on such examination to affirm or reverse the same, according to law.

1 Inst. 260 *a*. 3 Comm. 40.

2. During the term in which a judicial act is done, the record may be amended or invalidated without a writ of error: because, during the term, the record is in the breast of the Court, and the rolls are alterable at the discretion of the Judges. And now, the courts of justice allow amendments to be made at

any time while the suit is depending, notwithstanding the record be made up, and the term be past; for they consider the proceedings as in *fieri* until the judgment is given: so that a fine may now be amended or invalidated at any time during the term in which it is levied, by an application to the Court of Common Pleas. A fine may also be amended as to any mistake or misprision of the officers of the Court at any time, and the cases on this subject have been already stated. ante, c. 7.

3. A writ of error is, properly speaking, a proceeding in the nature of an appeal, and therefore must be brought in a superior court; so that a writ of error to reverse a fine must be brought in the Court of K. B., because that Court has an appellant jurisdiction over the Court of Common Pleas. But where the error assigned in a judgment does not arise from any fault in the Court, but from some defect in the execution of the process, or from some matter of fact, the writ of error must be brought in the same Court in which the judgment was given; and therefore, in cases of this kind, a writ of error to reverse a fine must be brought in the Court of Common Pleas. Fitz.N.B.21.

4. With respect to fines levied before the Justices of Wales, pursuant to the stat. 34 & 35 Hen. VIII. it is provided by that statute, § 113, that all errors therein shall be redressed by writ of error, to be sued out of the King's Chancery in England, returnable before the King's Justices of his Bench in England. And by the stat. 43 Eliz. c. 15. § 6, it is enacted, that all fines levied in the county of the city of Chester, pursuant to that act, shall be subject to be reversed, upon writs of error to be sued and prosecuted before the High Justice of the county

palatine of Chester, as other judgments given in the Portmoot Court.

Who may bring it. Roll. Ab. tit. Error, K.

5. With respect to the persons who may bring a writ of error, it should be premised, that no person has a right to reverse a fine, unless he can show that, upon such reversal, he will be entitled to the land; for the courts of law will not dispossess the tenant in possession, unless the demandant can make out a clear title; possession always carrying with it the presumption of a good title, until the contrary appears. Besides, if the person who demands the reversal of the fine cannot prove that he has a title to the lands of which the fine was levied, it follows that he is not affected by it, and it would be trifling with courts of justice for a person to seek relief who cannot make it appear that he has received an injury.

Dyer, 90 *a.*

6. The person, therefore, entitled to a writ of error to reverse a fine, is he who would have had the lands if the fine had not been levied; which, in general, is the heir at law. But where one who is seised *ex parte materna* levies a fine, in which there is error, the heir *ex parte materna* will be entitled to the writ of error. The youngest son, when entitled to the lands, by the custom of borough English, shall have the writ of error, and not the heir at common law, because this remedy descends with the land: a brother of the half-blood, however, is not entitled to bring a writ of error, on a fine levied by his elder brother.

1 Leon. 261.

Idem.

1 Inst. 14 *a.* *n.* 6.

Champernoon v. Godolphin, Cro. Jac. 150. Tit. 36. c. 11.

7. In a writ of error to reverse a fine, it is not necessary that the person who brings the writ should deduce his title and pedigree, unless it be a special case, varying from the common course; as where a writ of error is brought by a special heir in tail or a person in remainder.

8. All those who are parties to a fine, must, in general, join with the person entitled to the land, in reversing it; but this rule admits of some exceptions.

9. Husband and wife were tenants for life, with remainder to an infant in fee, and they all joined in levying a fine: the infant alone brought a writ of error to reverse it, on account of his non-age. Piggot v. Russell, Cro. Eliz. 115.

It was objected, that since all had joined in the fine, they should likewise join in the writ of error; that the husband and wife should be summoned and severed, and then the infant alone might proceed to assign errors. But it was adjudged that the writ of error was well brought by the infant alone; because the error assigned was not in the record, but without it; namely, in the person of the infant.

10. No person can have a writ of error to reverse a fine, who took any estate by it: because no recoveror can bring a writ of error to defeat a record, by which he himself has recovered: for the judgment in a writ of error is, to avoid that which the plaintiff has lost; and it is held on this principle, that in a fine *sur done, grant, and render*, the cognizor cannot assign error in the grant and render, by which he himself has taken an estate. 5 Rep. 39 *b*.

11. A writ of error to reverse a fine must be brought against some one of those who were parties or privies to it, and not against the tenant of the land only. But the Court will not in general reverse a fine, unless a *scire facias* is returned against the persons who are then in possession; for the cognizees of a fine are frequently nothing more than trustees, and have no beneficial interest in the lands. Against whom. 1 Salk. 339. Holt's R. 614. Tit. 36. c. 11.

12. Errors may be assigned either in fact, as that the cognizor of a fine was an infant, or else in law, that is, on account of some defect appearing on the What may be assigned for Error.

face of the record. But nothing can be assigned for error in fact in a fine which contradicts the record,

1 Inst. 260 *a*. because the records of a court of justice are of such credit, that they can only be defeated by matters of equal notoriety with themselves; and therefore, although the circumstances assigned for error should be fully proved by witnesses, yet such evidence cannot be admitted.

ante, c. 2. § 60. 13. Thus it has been already stated, that where the entry of the King's silver, before the death of the cognizor, appears upon record, no averment can be made. And that no averment can be made as to the time when a fine was acknowledged, which contradicts the chirograph.

Dyer, 89 *b*. 14. It cannot for the same reason be averred that the cognizor of a fine died before the *teste* of the writ of *dedimus potestatem*, when it appears by the certificate of the concord that he was alive, for this contradicts the record. But an averment of the death of the cognizor generally, before the engrossment, entry, and recording of the King's silver, is admissible.

Wright v. Wickham, Cro. Eliz. 468. 15. Where a fine was acknowledged in court, it was held that the plaintiff in error could not assign for error, that the cognizor died before the return of the writ of covenant; for that would directly contradict the record; because no fine is ever acknowledged in court until the writ of covenant is returned, for till then the parties are not before the court: But that where a fine was acknowledged before commissioners, it might then be averred that the cognizor died before the return of the writ of covenant, or that after the acknowledgment, and before the return of the certificate thereof, the cognizor died; because these facts were consistent with the record.

16. A fine was acknowledged before Roger Manwood, Esq. one of the Justices of the Court of Common Pleas; and afterwards a writ of *dedimus potestatem* was directed to Sir Roger Manwood, he having been knighted after the fine was acknowledged, who returned it with his name and title. Arundel v. Arundel, Cro. Eliz. 677.

It was held that it could not be assigned for error that the *dedimus potestatem* was directed to Sir R. M. Knt. where there was no such person at the time, he being but an Esquire; because it contradicted the record, by which it appeared that the writ was directed to Sir R. M., who by virtue thereof took the acknowledgement.

17. By the statute 23 Eliz. c. 3. § 2. it is enacted, "That no fine shall be reversed for false or incongruous Latin, rasure, interlining, misentering, or not returning of the sheriff, or want of form in words, and not in substance."

18. Although it is a rule that in actions for the recovery of dower, the parol shall not demur on account of the infancy of the heir; yet if a man and his wife levy a fine, and after the husband's death the wife brings a writ of error to reverse it, in order to recover her dower; the heir may plead his infancy, and the parol will demur. The Parol demurs for Infancy.

19. In error to reverse a fine levied by the plaintiff and her husband, the heir being summoned as terre-tenant, appeared and pleaded that he was within age, and prayed that the parol might demur. The plaintiff counterpleaded the age, showing that she was entitled to have dower before the fine levied; and was now barred of dower by the fine, which was erroneous; and set forth the errors. Herbert v. Binion, Cro. Ja. 392.

Upon demurrer and solemn argument it was adjudged, that the parol should demur; and that the plaintiff should not have the advantage to take from

the defendant his age, having by the fine, so long as it stood in force, barred herself of her dower. And therefore the law would rather favour the infant, whose privilege was immediate, than the plaintiff's, which was only mediate, after the fine was reversed.

Manner of Reversal, Co. Read. 13. Fazakerly v. Baldo, 1 Salk. 341.

20. The manner of reversing fines differs from that which is observed in reversing other judgments; for in those cases the record itself is removed into the court in which the writ of error is brought; because in adversary suits errors cannot be assigned on a transcript of a record only: but in cases of fines, nothing more than the transcript is removed, on which the errors are assigned: and if the fine is erroneous, the Court of King's Bench may send for the record itself, and reverse it; or else send a writ to the treasurer or chamberlain of the Court of Common Pleas, to take it off the file.

1 Rep. 76 *b.* 1 Roll. R. 11. 3 Lev. 36.

21. It is said by Lord Coke and others, that if there be tenant for life, remainder in fee to an infant, and they both join in levying a fine, which is afterwards reversed by the person in remainder, on account of his infancy; yet that the cognizee shall have the lands during the life of the tenant for life. But in a subsequent case it was adjudged, that though a fine might be reversed, as to part of the lands, and remain good as to the residue; yet that a fine could not be reversed *in toto* as to one person, and remain good *in toto* as to another.

Zouch v. Thompson, 1 Ld. Raym. 179.

Must be brought within 20 years.

22. By the statute 10 & 11 Will. III. c. 14. reciting, that fines, recoveries, and judgments were reversible at any time, without restraint or limitation, for any error or defect which happened therein, by the ignorance or carelessness of clerks, and sometimes by unavoidable accidents; it is enacted, § 1, "That no fine or common recovery, &c. shall be reversed or avoided for any error or defect therein, unless the

writ of error or suit for the reversing of such fine, recovery, &c. be commenced or brought and prosecuted with effect, within twenty years after such fine levied, or such recovery suffered." "Provided always, that if any person who shall be entitled to any such writ of error as aforesaid, shall, at the time of such title accrued, be within the age of 21 years, or covert, *non compos*, imprisoned, or beyond the seas; then such person, his or her heirs, executors, or administrators, (notwithstanding the said twenty years expired) shall and may bring his, her, or their writ of error, for the reversing any such fine, recovery, &c., as he, she, or they might have done in case this act had not been made; so as the same be done within five years after his or her full age, discoverture, coming of sound mind, enlargement out of prison, or returning from beyond the seas, or death; but not afterwards or otherwise." § 2.

23. In consequence of this statute, a writ of error to reverse a fine must be brought within twenty years after the fine has been levied, and not within twenty years after a title has accrued; for the time when the fine was levied is the period from which the twenty years are to be reckoned. Vide Lloyd v. Vaughan, Tit. 36. c. 11.

24. A person may bar himself from bringing a writ of error in several ways. Thus if a person releases all his right in, or makes a feoffment of the land, whereof a fine has been levied, he will be thereby barred from bringing a writ of error; because, by his release and feoffment, he has for ever excluded himself from the land; and no person can have a writ of error, who is not entitled to the land. How it may be barred. 1 Roll. Ab. 789.

25. But it was unanimously held in the case of Wright v. Wickham, that if a person releases his ante, § 15. 10 Vin. Ab. 15.

right in, or makes a feoffment of part of the land, he may still reverse the fine, as to the remainder.

Hart's Case, 1 Roll. Ab. 788. Noy, 59.

26. If an infant brings a writ of error to reverse a fine, levied by him during his infancy; and on inspection, his non-age is recorded by the Court; but before the fine is reversed, he levies another fine, the second fine will prevent him from reversing the first; because the second fine, having entirely barred him of all right to the lands, must also deprive him of all remedies to recover them.

Carrington's Case, 1 Roll. Ab. 788. Cro. Eliz. 151. Molton's Case.

27. If a tenant in tail levies an erroneous fine, and afterwards levies another erroneous fine, and dies, and the issue in tail brings a writ of error upon the first fine, and the defendant pleads in bar the second fine, and after the issue brings a writ of error upon the second fine, and the defendant pleads in bar the first fine, by which the right is bound; the plaintiff, may reply upon the first writ, that the second fine is erroneous; and upon the second writ, that the first fine is erroneous; and so shall be helped.

Cockman v. Farrer, T. Raym. 461. T. Jones, 181.

28. In a writ of error to reverse a fine, the defendant cannot plead in bar the same fine which is attempted to be reversed; and five years nonclaim. *Quia non valet exceptio istius rei, cujus petitur dissolutio.*

Vide Tit. 36. c. 8.

29. A common recovery will bar the issue in tail from bringing a writ of error to reverse a fine.

Writ of false Judgment. 1 Inst. 288 *b.*

30. A writ of error can only be brought to reverse a judgment in a court of record; for to amend errors in a base court, which is not of record, a writ of false judgment lies, returnable in the Court of Common Pleas.

Writ of Deceit. ante, c. 4. Fitz. N. B. 98. 2 Inst. 216.

31. Where a fine is levied in the Court of Common Pleas, of lands held in ancient demesne, the lord may reverse it by writ of deceit: and such writ may be brought by the lord against the parties to the fine,

and the *cestui que use;* by means of which he will obtain judgment, not only for damages, which are usually remitted, but also to recover his court and jurisdiction over the lands, and to annul the former proceedings. Rex v. Mead, 2 Wils. R. 17.

32. If a fine be levied of lands, whereof part is held in ancient demesne, and part frank fee, and the lord in ancient demesne brings his writ of deceit, the Court of K. B., upon a view of the transcript of the record, and proof that part of the lands is ancient demesne, will reverse the fine as to that part. They will not, however, order the fine to be taken off the file, as in cases where the whole fine is reversed, because it will remain good as to the lands which are frank fee; but will order a mark to be made on the fine, to show that it is cancelled, as to the lands held in ancient demesne. Anon. 1 Leon. 290.

32. The lord of a manor of ancient demesne is not barred of his writ of deceit by the death of any of the parties to the fine.

33. A writ of deceit was brought by the lord of a manor of ancient demesne, to avoid a fine levied of lands held of him in ancient demesne, as of the said manor. Zouch v. Thompson, 1 Ld. Raym. 177.

It was argued for the defendant, that the cognizor and cognizee being both dead, the lord could not now maintain an action of deceit, because it was only a personal action, and therefore died with the person. But it was resolved, that a writ of deceit did lie in such a case, against the heir of the cognizor or cognizee, because it was a real deceit, and did not resemble the personal deceit of non-summons: and if the law were otherwise, the lord of a manor of ancient demesne would be for ever barred of his right of in-

heritance, in case the parties to such a fine should happen to die the day after it was levied.

10 Rep. 50 *a.* 1 Bac. Ab. 8°. 175.

34. Where a fine levied in the Court of Common Pleas, of lands held in ancient demesne, is reversed by writ of deceit, it is said to be doubtful whether the fine shall still hold good between the parties. Some say it does not become entirely void, nor is the cognizor restored to his land against his own solemn acknowledgement on record; especially since the lord, who brings the writ of deceit, seeks nothing more than to restore the land to the privileges of ancient demesne. Others hold, that the writ of deceit and the reversal thereon entirely avoids the fine, and restores the cognizor to the possession of the land; for the cognizance, though on record, shall be no estoppel; because it was made in a Court which had no jurisdiction, and therefore the whole proceedings were *coram non judice*.

Motion. 2 Show. Ca. 266.

35. In some cases the Court of Common Pleas will vacate and set aside a fine upon motion, although the King's silver has been paid and the fine completed, without putting the parties to the trouble and expence of a writ of error: in the same manner as they would set aside a judgment, obtained by trick or surprise.

Hutchinson's Case, 2 Lev. 36.

36. Thus, where it evidently appeared to the Court that a husband had prevailed on his wife to levy a fine, she being but sixteen years old, the fine was vacated, and the exemplification brought into Court and delivered up.

The commissioners were also ordered to be prosecuted.

Modes of avoiding the Effects of a Fine.

37. Although a fine can only be reversed by a writ of error, yet its effects may be avoided in several

other ways. At common law there were four modes of avoiding a fine; two by matter of record, and two by acts in *pais*. Those by matter of record were, a real action commenced within a year and a day after the fine was levied; and an entry of a claim on the record of the foot of the fine itself, in this manner: *Talis venit et apponit clameum suum.* Those by acts in *pais* were, a lawful entry upon the land, by the person who had a right; and in case that could not be done, then a continual claim. Plowd. 359. 2 Inst. 518. 2 Black. Rep. 994.

38. By the statute 4 Hen. VII., all those who are affected by a fine must pursue their title by way of action or lawful entry; so that a claim entered on the record of a fine would now be ineffectual. An action commenced within five years after a fine has been levied, will be sufficient to avoid it, although judgment be not obtained within seven years after: but such action must be prosecuted with effect; for if an action be commenced within the time prescribed, and afterwards discontinued, it will not avoid a fine. Real Action. Brasier's Case, 2 Leon. 53. 1 Vent. 45.

39. The suing out a writ, and delivering it to the sheriff, does not amount to a pursuing of a claim or title by way of action, unless the writ be returned by the sheriff. Fitzhugh's Case, 3 Leon. 221.

40. The action mentioned in the statute 4 Hen. VII. must be a real action, so that an ejectment will not avoid a fine. Comb. 249.

41. A bill in Chancery is not such a claim under the statute 4 Hen. VII. as will avoid a fine. There is, however, an exception to this rule in the case where a fine has been levied of a trust estate; because no entry by the *cestui que trust*, nor claim, or other legal act, will be sufficient to avoid the fine, or suspend the bar arising from the non-claim: it can only be by a bill in Chancery, as the claim to avoid a fine 1 Cha. Ca. 268. 278. 2 Black. Rep. 994.

ought to be of a nature corresponding with the estate.

Actual Entry. 42. A fine may also be avoided by an actual entry made on the lands whereof the fine has been levied; Plowd. 358. provided the person who seeks to avoid the fine has a right of entry; for if the right of entry be taken away, and a right of action only remains; as where a fine ante, c. 12. § 16. operates as a discontinuance of the estate, there, an 1 Vern. 213. actual entry on the land will not avoid the fine, but a real action must be brought.

2 Wils. R. 45. 43. No entry is necessary where the fine is levied without proclamations, for the statute 4 Hen. VII. does not extend to such a fine; and therefore it may be avoided at any time within twenty years.

Tit. 31. c. 2. § 38. 44. With respect to the mode of making an entry, it must be on the land, and with an intention of claiming the freehold, against the fine.

Anon. Skin. 412. 45. A fine having been levied, the lessor of the plantiff proved, that at the gate of the house in question, he said to the tenant, he was heir to the house and land, and forbade him to pay more rent to the defendant: but he did not enter into the house when he made the demand. On which it was agreed, that the claim at the gate was not sufficient. Then it was proved that there was a court before the house, which belonged to it, and though the claim was at the gate, yet it was on the land, and not in the street; and that was held good.

Tit. 31. c. 2. § 39. 46. If a person is prevented, by force or violence, from entering on lands, whereof a fine has been levied, he must then make his claim as near the land as he can; which in that case will be as effectual as if he had made an actual entry.

Clerke v. Pywell, 1 Saund. 319. 47. It was adjudged by the Court of King's Bench in the reign of Cha. II., that the delivery of a de-

claration in ejectment, did not amount to an entry to avoid a fine, though the defendant should appear to it, and confess lease, entry, and ouster; for there must be an actual entry made, *animo clamandi*: whereas in an ejectment there is only a fictitious or supposed entry, for the purpose of making a demise, and an actual entry must be made before the time when the demise is laid.

48. Upon a special verdict in ejectment, it was found that a fine had been levied of the premises in question; and that the lessor of the plaintiff entered into the premises with intent to make the demise in the declaration mentioned, but did not then make an actual entry for the purpose of avoiding the fine, but that after the demise laid, the lessor of the plaintiff made an actual entry. It was insisted for the defendants, 1°. That an actual entry was necessary to avoid the fine. And 2°. That the demise could not be laid before the lessor had regained the possession by the actual entry. The Court was of opinion with the defendants on both these points; and on a writ of error in the House of Lords, it was argued for the plantiff, that a fine with proclamations does not, by force of the statute 4 Hen. VII. operate as a bar to conclude strangers, till after five years elapse without entry or action; and therefore the verdict having found that the lessor of the plaintiff made his first actual entry after the demise laid, he thereby avoided the operation of the fine, and was at liberty to lay the demise in his declaration, which is a mere fiction of law, as early as he thought fit after his right accrued, in the same manner as if his title had stood independent of such fine, so rendered ineffectual within the plain intent of the statute: and if such entry was not good to maintain this demise, it must follow, that in every case

Berrington v. Parkhurst, 2 Stra. 1086. Andrews 125. 4 Brown's Ca. in Parl. 85.

where a fine is levied by a wrong-doer, and not discovered till two, three, or four years afterwards, the intermediate profits between the time of levying such fine, and the entry of the lawful owner, must be absolutely lost, although the statute gives five years to enter, and an entry at any time within the five years purges the disseisin and the wrong from the beginning, and brings the person so entering within the saving of the statute, to all intents and purposes. On the other side it was said, that an actual entry is necessary to avoid a fine, before an ejectment can be brought, and it must also be before the time of the demise; because a fine is of that high nature, even at common law, that it dispossesses all persons claiming title, and consequently a lease to found the ejectment upon, cannot be made till the lessor regains the possession. As to the entries found by the verdict to have been made subsequent to the time of the demise, they were of no use in the present case; for the ejectment being originally void, could not be made good by any subsequent act; and therefore whatever effect those entries might have in other respects, they could not make the lease good. That the word *action* in the statute 4 Hen. VII. has always been understood to mean real actions, which were then in use: and it has often been determined, that the bringing an ejectment is not sufficient to avoid a fine.

It appears from Sir John Strange's report of this case, that the questions put to the Judges were, 1st. Whether an actual entry was necessary to avoid a fine? 2d. Whether the demise being laid before the time of the first entry, the ejectment could be maintained? To the first question they answered in the affirmative; to the second, in the negative: upon which the judgment was affirmed.

S. P. Doug. 484.
7 Term Rep. 732.

49. The entry to avoid a fine must be made by the person who has a right to the land, or by some one appointed by him; for a person who has a right of entry, may empower another to enter for him. But if a stranger makes an entry on lands, whereof a fine has been levied, in the name of a person who has a right to the land, without any preceding command or subsequent assent, within five years, by the person having right, it will not be sufficient; for the statute 4 Hen. VII. bars all persons who do not claim within five years; by which means an election is given to all those who have a right, at the time when the fine is levied, to claim or not; and a stranger cannot make this election for them. 1 Inst. 258 *a*.

50. A disseisor levied a fine with proclamations, the disseisee not knowing it; and a stranger made an entry within five years, to the use of the disseisee, but the disseisee did not assent to it till the five years were expired. Pollard v. Luttrell, Poph. 108. Cro. Eliz. 561.

It was determined by all the Judges, that the assent of the disseisee to the entry, after the five years had expired, was not sufficient to render it valid; because the statute of fines ought to be taken strictly, being made for the purpose of repose and tranquillity.

51. A person entitled to an estate in remainder or reversion, expectant on an estate for life or years, or the lord of a tenant by copy of court roll, may enter in the name of the tenant for life, the tenant for years, or the copyholder, to save those particular interests, as well as their own freehold and inheritance: and the entry of those particular tenants will also save the rights of the lord, the remainder-man, or reversioner, on account of the privity of estate which is between them. A guardian by nurture or in socage may 9 Rep. 106 *a*. Touch. 33.

also enter in the name of his ward, to avoid a fine; and such entry will save his right.

Tit. 18, 19, 20.

52. The entry of one joint tenant, coparcener, or tenant in common, will be sufficient to avoid the effect of a fine as to the other joint tenant, coparcener, or tenant in common.

2 Inst. 518. West Symb. P. 2. 73 *a*.

53. If the estate which passed by a fine is at any time after defeated by entry, the fine will by that means lose all its force and effect, not only with respect to the person who entered, but also with respect to all others, except those claiming by force of an entail. And it is said in the case of Stowell v. Zouch, that if there be tenant for life, remainder for life, remainder in fee, and the first tenant for life aliens, and the alienee levies a fine, the person in remainder for life may enter and defeat the fine; in which case it will not bar the remainder in fee.

Plowd. 359.

Must be followed by an Action.

54. By the statute 4 Ann. c. 16. § 16. it is enacted, "That no claim or entry to be made of or upon any lands, tenements, or hereditaments, shall be of any force or effect, to avoid any fine levied or to be levied with proclamations, according to the form of the statute in that case made and provided, in the Court of Common Pleas, or in the Courts of Sessions in any of the counties palatine, or in the Courts of Grand Sessions in Wales, of any lands, tenements, or hereditaments; unless upon such entry or claim an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect."

Plea that the Parties had no Estate, &c.

55. The proper mode of reversing a fine for any defect in the record is, by writ of error. But where a fine is void *ab initio*, either as to all mankind, or as to some particular persons, its effects may then be avoided by plea.

56. Thus, where none of the parties to a fine have an estate of freehold in the lands whereof it is levied, such fine is totally void as to all strangers, and may be avoided by pleading—*Quod partes finis nec eorum aliquis, tempore levationis finis, nihil habuerunt, nec eorum aliquis habuit, &c. Sed quidam I. S. cujus statum ipse habet.* ante, c 5. § 20. Dyer, 215 *b.* Co. Read, 12. 2 Inst. 523.

This mode of avoiding a fine appears to have been already established in the time of Bracton:—*Excusatur enim quis quod clameum non apposuerit, scilicet ubi finis ipso jure sit nullus, ut si factus fuit de tenemento quod alius tenuit, ut si ipse qui debuit clameum apposuisse, vel antecessor suus, fuit in seisina de eadem re, quando finis factus fuit, et non ille vel antecessor suus qui finem allegat.* 436 *b.*

57. The reason that a fine levied by persons who have no freehold estate in the lands has no effect is, because it divests no estate; those who are entitled to the lands whereof the fine is levied being in possession thereof: and it has been already stated, that no estate is barred or affected by a fine unless it is divested out of the real owner. ante, c. 13.

58. The plea, *quod partes finis nihil habuerunt*, might originally have been pleaded by any person who was not a party to the fine. And there is a very long case in the Rolls of Parliament, 14 Edw. III. No. 31, in which it was determined that a stranger should be allowed this averment. It has been already stated, that by the third saving in the stat. 4 Hen. VII., this plea is allowed to every person not party or privy to the fine; but that it is settled that the issue in tail are comprised under the word privy, and are therefore deprived of this plea. Rot. Parl. vol. 2. 122. ante, c. 11. § 38.

59. Lord Coke says, that in some cases privies in blood, and inheritable also, shall have an averment 2 Inst. 517.

against the fine, notwithstanding the stat. 4 Hen. VII.; and therefore if tenant in tail accepts a fine *sur cognizance de ceo*, &c., the issue in tail, that is privy and heir in tail, shall aver continuance of possession in the father, for it stands well with the fine. And so, in the case above, if tenant in tail had granted and rendered the land to the conuzor, the issue in tail might have averred continuance of possession in the father; for the fine was executory, and nothing vested in the conusor till execution.

pa. 13. 60. It is said in the Touchstone, that the cognizor or cognizee of a fine must have an estate of freehold in possession, reversion, or remainder; but this is a mistake, for if a person, having only an estate in remainder or reversion, levies a fine, it may be avoided, on the ground that *partes finis nihil habuerunt.*

Dormer v. Parkhurst, Tit. 36. c. 2.

Carhampton v. Carhampton, Irish Term R. 567. 61. Lord Carhampton being tenant for life, remainder to his wife for life, remainder to his eldest son in tail, the eldest son levied a fine in the lifetime of his father, and while his father was in possession. On the death of Lord Carhampton his son entered, and continued in possession for seven years. Lady Carhampton then brought an ejectment against her son, to which he pleaded the fine and non-claim. On the trial, two exceptions were taken to the Judge's opinion: first, because he admitted evidence to prove that the defendant had no estate in possession in the lands when he levied the fine: secondly, it being proved that the estate was in the possession of the defendant's father when the fine was levied, because he held that no entry was necessary to avoid the fine, or to enable the plaintiff to bring the ejectment.

Lord Carleton delivered the opinion of the Court of Common Pleas, that the fine was no bar, because the defendant had no estate in the lands; and that the plaintiff might maintain an ejectment, without making an entry.

Doe v. Perkins, 3 Mau. & Sel. 271.

62. Richard Rowe devised all his estates to Richard Rowe his son for life, and after his decease to the heirs of his body in tail, and for default of such heirs, to his three daughters and their heirs. Richard Rowe the son, by a deed dated in 1724, gave, granted, assigned, and set over to his mother, the possession of the full third part of all the premises, to hold to her for her life, as if she had been in possession of the same by virtue of a writ of dower; and livery of seisin was given to the widow according to this deed, who thereupon entered and became seised of the undivided third part of all the lands contained in the said deed, and continued so seised till her death, in 1759. Richard Rowe the son, in 1730, levied a fine *sur cognizance de droit come ceo, &c.* with proclamations, of the whole of the premises, and suffered a common recovery thereof, and died without issue, having devised away all the estate to a stranger. The son of the survivor of the three sisters brought an ejectment for the recovery of an undivided third part of the estate: to this the defendant, the devisee, pleaded the fine, and five years non-claim.

Rowe v. Power, Dom. Proc. 1805. Bos. & Pul. N.R. vol. 2. 1.

The question was, whether this fine and non-claim was a bar to the plaintiff; and the Judges of the Court of Exchequer in Ireland held that it was not. Upon a writ of error in the Exchequer Chamber of Ireland, the judgment was affirmed.

Upon a writ of error to the House of Peers, it was contended, that the assignment of dower was

void, and therefore the widow took no estate under it; so that Richard Rowe being seised of the freehold, the fine operated on the whole estate, and not on two-thirds of it only.

On behalf of the defendant in error it was said, that as Richard Rowe the son had nothing but an estate in remainder in the third assigned to his mother in dower, the fine with respect to this third was within the exception, *quod partes finis nihil habuerunt.* For this was a fine *sur conuzance de droit, &c.* which always imported an estate in possession in one of the parties, which must be at the least an estate of freehold, as a fine partaking of the nature of a real action could not be levied of a chattel interest; and there were other species of fines for passing freehold interests in remainder or reversion. A party therefore insisting upon a fine *sur conuzance de droit, &c.* with non-claim, as a bar to a stranger, was bound, in answer to the exception *quod partes finis nihil habuerunt,* to show that either of the parties had such an estate as could qualify him to levy a fine of that description, that was, at the least an estate of freehold in possession. It was the very issue, knit by the express words of the plea, *quod partes finis nihil habuerunt ut de libero tenemento.* Co. Ent. 632 *a.* So since the statutes of pernors of profits, the entry had always been *quod partes finis nihil habuerunt, nec in possessione, nec in usu.* And the pleading went on, *sed quidam A. B. fuit seisitus tempore finis.*

The following question was put to the Judges— "Whether the fine was a bar to the plaintiff's title." Lord Ch. Just. Mansfield delivered their opinion. He said the case depended on the effect of the deed, by which the son gave to his mother one whole un-

divided third of the lands. It was admitted throughout the whole argument for the plaintiff, that if this deed operated as an assignment of dower, the fine was no bar; and this was admitted, because in the case it was stated that Richard Rowe, who levied the fine, had no seisin in the premises: he had no freehold in the land as to one third, which was given instead of dower by the assignment of the deed of 1724, if that was a good assignment. With regard to that one third, a fine could have no operation as against strangers; supposing it to be well assigned by way of dower, it could have no other effect than that of merely passing, by way of grant, the remainder. By statute, the fine barred the issue in tail, and made the estate descend as a fee, so long as there was such issue; but the fine could not affect the precedent estate of the widow, if the assignment of her dower was good. If therefore the deed had the effect of an assignment of dower, there was an end of the bar.

He then stated that the assignment of dower was good, and transferred the freehold to the widow; and concluded, that the Judges concurred with him, that the fine did not operate as a bar.

The judgment was affirmed.

63. In the case of a trust estate, the plea *quod partes finis nihil habuerunt*, is not allowed by the Court of Chancery, as has been already shown. ante, c. 10, § 36.

64. By the common law, a fine might be avoided on account of any fraud in the parties who levied it. Averment of Fraud.

Thus Bracton says,—*Excusatur etiam quis quod clameum non apposuerit, si finis factus fuerit per dolum vel fraudem, vel alio modo in alterius præjudicium, quod finis tenere non debeat.* 436. *b.*

Hubert's Case, 12 Rep. 123. 5 Rep. 68 *b.* Co. Read. 7.

65. In 29 Eliz. one Hubert was convicted in the Star Chamber, upon a bill exhibited against him for procuring one Webster to acknowledge a fine in the name of Alexander Gillibrand, who was then beyond sea. The sentence was, that he should be fined and imprisoned; and that the fine thus levied should be avoided, if it could be so done, by entering a *vacat* on the roll, or otherwise, as the justices of the Common Pleas should best approve: and if it could not be so made void, that then Hubert, by fine or otherwise, as Gillibrand might devise, should reconvey the land to him and his heirs.

S. C. Cro. Eliz. 531.

66. "Lord Keeper Egerton said he had always noted this difference. If one of my name levies a fine of my land, I may well confess and avoid this fine, by showing the special matter; for that stands well with the fine. But if a stranger who is not of my name levies a fine of my land in my name, I shall not be received to aver that I did not levy the fine, for that is merely contrary to the record; and so it is of all reconusances, and other matters of record. But I conceive, when the fraud appears to the Court, as here, they may well enter a *vacat* on the roll, and so make it no fine; although the party cannot avoid it by averment, during the time that it remains as a record."

ante, c. 2. § 62.

67. Soon after the Restoration, doubts were entertained respecting the power of Parliament to set aside a fine obtained by force and fraud.

Lords' Journ. vol. 11. p. 191. 12 Car. 2.

A bill having been brought into the House of Lords to vacate certain fines unduly procured to be levied by Sir Edward Powell and Dame Mary his wife, the House commanded the Judges to deliver their opinions thereon in point of law. The Lord Chief Justice of the King's Bench delivered it as his

opinion, and that of all the rest of the Judges, to be, "That they did not find by any record or precedent in their law-books of any fine which had been perfected, that had been vacated for fraud or force in Parliament, or any other place." The question was then put, whether the fine was obtained by force; and it was resolved in the affirmative. The bill passed, but the following protest was entered, signed by Lord Chancellor Hyde and several other Lords, "That fines are the foundations of the assurances of the realm, upon which so many titles depend, and therefore ought not to be shaken; nor hath there any precedent occurred to us wherein any fines have been vacated by judgment or act of parliament, or otherwise, without consent of the parties; the eye of the law looking upon fines as things always transacted by consent, and with that reverence, that no averment whatsoever shall be against them when they are perfected." In the House of Commons counsel were heard for and against this bill; and the House being satisfied that they had full power and jurisdiction of the cause, the bill passed.

Id. pa. 209.

Commons Jour. vol. 8. pa. 344. 13 & 14 Car. 2. c. 27.

68. A fine may also be avoided by an averment of fraud, in consequence of the statute 27 Eliz. c. 4., where it appears to have been levied to secret uses, for the purpose of deceiving purchasers: or by an averment of usury, under the statute 13 Eliz. c. 8.

3 Rep. 80 *a*. Jenk. 254.

Tit. 32. c. 26 & 27.

69. Although a fine duly levied is as effectual and binding in a court of equity, as in a court of law; because it is one of the common assurances of the realm, and was originally instituted for the purpose of securing those who were in possession of lands against all claims whatever; yet if any fraud or undue practice appears to have been used in ob-

Courts of Equity.

Day v. Hungate, 1 Roll. Rep. 115. Welby v. Welby, Tothill, 99.

taining the fine, the Court of Chancery will then relieve against it, as much as against any other conveyance; for though it might be extremely improper and inconvenient to admit of an averment in a court of common law against a fine obtained by fraud, because it would be dangerous to permit the evidence of a record to be questioned in any case whatever, yet as there was a method in which relief might be given in cases of this kind, without contradicting the principles of the common law, it was highly proper that a court of equity should adopt it; and the Lord Chancellor appears to have exercised this jurisdiction as early as the reign of Queen Elizabeth.

ante, c. 10. § 32.

70. The Court of Chancery however does not absolutely set aside a fine so obtained, nor does it send the party aggrieved to the Court of Common Pleas to get it reversed; but it considers all those who have taken an estate by such fine, with notice of the fraud, as trustees for the persons who have been defrauded; and decrees a reconveyance of the lands, on the general ground of laying hold of the ill conscience of the parties, to make them do that which is necessary for restoring matters to their former situation. With respect to any technical error in a fine, or irregularity in the commissioners who took the acknowledgment of it, these are matters only cognizable in the Court of Common Pleas; because a fine being of the same nature as a judgment, is properly examinable in that court only where it is entered.

Clark v. Ward, Prec. in Cha. 15. 4 Bro. Parl. Ca. 70. St. John v. Turner, 1 Ab.Eq.259. 1 Ves. 289.

Wright v. Booth, Tot. 101.

71. The plaintiff being simple, was drawn in to levy a fine of his lands. It was ordered that the lands should be re-assured, if the defendant did not pay a valuable consideration; or if he failed of payment thereof, then the said lands should be re-assured.

72. A bill was filed by one Coleby, to be relieved against a purchase made from the plaintiff's father; suggesting that he had been circumvented and imposed upon by the defendants. On the other side the defendants insisted on their purchase; and it appeared that there were, first, articles for the purchase under hand and seal; and some time after that, a conveyance actually made and executed, in pursuance of these articles, and the purchase-money paid and secured; and after all this, a fine levied by the plaintiff's father to the purchaser. Coleby v. Smith, 1 Vern. 205.

Lord Keeper North set the purchase aside, because there appeared to have been some art used to persuade the plaintiff's father to sell the lands.

73. A person prevailed on a woman to levy a fine of some houses, and to execute a deed declaring the uses thereof to himself and his heirs. It being proved that the woman, at the time of levying the fine, declared that she must make use of some friend's name, in trust for herself; and she having afterwards declared in her will, that she only levied the fine for the better enabling her to dispose of her estate; and having devised it to J. S. subject to the payment of her debts; the Court of Chancery decreed, not only that the lands were liable to the debts of the testatrix; but also that the person to whose use the fine was declared, should convey the houses to J. S., according to the will. Woodhouse v. Brayfield, 2 Vern. 307. Penne v. Peacock, Forrest, 41.

74. By the common law, if an infant or idiot has by any neglect or contrivance been permitted to levy a fine, his declaration of the uses thereof will be good at law, so long as the fine remains in force; and if the fine is never reversed, his declaration of the uses will be binding and conclusive on him, and his heirs for ante c. 5. § 47. 2 Rep. 58 *a*. 10 — 42 *b*. 12 — 124. Hob. 224. 1 Ves. 304.

ever: because the law will not presume that a fine, which is a solemn act on record, has been levied by a person labouring under such disabilities; and therefore, until the fine, which is the principal, is annulled, the declaration of the uses thereof will remain good. Thus stands the common law on this point; but as the Court of Chancery has in many instances compelled persons, who had obtained estates under a fine in a fraudulent manner, to reconvey them to those who were really entitled thereto; so that Court will interpose its authority in cases of this kind, and not suffer the declaration of uses of a fine levied by an infant or idiot to bar his heirs; as no species of fraud can be more evident, than that of obtaining a conveyance from a person of this description.

Rushley v. Mansfield, Toth. 42.

Addison v. Dawson, 2 Vern. 678. 2 Ves. 403. 3 Atk. 313.

75. Thus where one Addison by a first and second inquisition was found a lunatic in 1706, from the year 1689, without any lucid interval. The defendant had got a mortgage, and at last an absolute purchase, at a great undervalue, by deeds, fines, and recoveries.

The Court set aside the purchases.

c. 10. § 32.

76. It has been already stated, that a fine levied by a trustee will not be allowed by the Court of Chancery to protect either the trustee or any person having notice of the trust. Thus in the case of Bovey v. Smith, the Lord Keeper put this case to Serjeant Maynard—"A. seised in fee in trust for B., for full consideration conveys to C., the purchaser having notice of the trust; and afterwards C., to strengthen his own estate, levies a fine. Whether B. the *cestui que trust* be not in that case bound to enter within five years? and the counsel were all of opinion that he was not; for C. having purchased with notice,

1 Vern. 149.

notwithstanding any consideration paid by him, was but a trustee for B.; and so the estate not being displaced, the fine cannot bar."

77. In the case of Shields v. Atkins, Lord Hardwicke said it would be dangerous, where a person entered on the foot of a trust, and never made any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of Lord Pomfret v. Lord Windsor, he observed, that a court of equity would not suffer a fine levied by a trustee, to bar an equitable right. And that if a practice of this kind was suffered to prevail, a court of equity might as well be abolished by act of parliament. 3 Atk. 563. 2 Ves. 482. 2 Atk. 631.

78. A court of equity will not suffer a fine and non-claim to bar any charge on lands, where the person who levied the fine had notice of such charge.

79. Thus where a person to whom lands were devised, subject to legacies, levied a fine, on which there was five years non-claim, and afterwards granted a rent-charge and mortgaged the lands; Drapers v. Yardley, 2 Vern. 662.

It was decreed, that the fine and non-claim was no bar to the legatees under the will: the devisee having no title but under the will, was implied notice; and all other purchasers, if any, to be brought in and contribute.

80. It is a principle of equity, that if a stranger enters upon an infant's estate, and receives the profits, he shall be looked upon as a trustee for the infant; and that the laches of a trustee shall not prejudice the *cestui que trust.*

81. Thus where A. devised lands to trustees until his debts were paid, and then to an infant and his Allen v. Sayer, 2 Vern. 368.

heirs. The defendant entered on the estate, and levied a fine; five years passed; the infant brought an ejectment as soon as he had attained his full age, but was barred by the fine and the non-claim of the trustees.

He then brought his bill in Chancery, where it was argued, that although the fine and non-claim was a good bar at law, the legal estate being in the trustees, who were of full age, and ought to have entered, yet that the plaintiff ought not to suffer by their laches, being an infant.

The Court decreed the possession, and an account of the profits; declaring that the fine and non-claim should not run upon the trust, in the infant's minority; nor he suffer for the laches of his trustee.

1 Vent. 82. 1 Lev. 272. 2 Ves. 482.

82. A mortgagor of a term for years cannot bar a mortgagee by a fine and non-claim; for although the mortgagee be in reality out of possession, yet when that is done by the consent of both parties; and the nature of the contract requires it should be so, while the interest is regularly paid; it would be against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security. And with respect to a mortgage in fee, the mortgagor having no estate of freehold, his fine would be void on that ground.

83. A fine and non-claim by a mortgagee in possession, will not, upon the same principle, bar the equity of redemption. Thus, where a fine and non-claim was pleaded to a bill brought for redemption of a mortgage, the plea was over-ruled.

Weldon v. Dux Ebor. 1 Vern. 132.

Lingard v. Griffin, 2 Vern. 189.

This doctrine is contradicted in a subsequent case; but it appears reasonable, that as long as any right of

redemption is expressly or impliedly admitted by the mortgagee in possession, his fine should not affect it.

84. Where a fine is levied by a person who has got into possession under a forged deed, a court of equity will not allow it to have any operation. And where tenants give a conditional possession only, provided they may pay their rents to a third person, until a suit is determined, a fine levied under such a possession will not, in a court of equity, be allowed to have any effect. 2 Atk. 381. Id. 390.

85. Where a fine is levied pursuant to a decree of the Court of Chancery, for a particular purpose, that Court will not permit it to operate farther than the decree directs. Goodrick v. Brown, 1 Cha. Ca. 49. 2 Vern. 56.

86. The intention of marriage articles is so far considered in equity, that if a fine be levied of the lands comprehended in such articles, to different uses, a court of equity will compel a conveyance of the lands to the uses of the marriage articles, notwithstanding the fine. Trevor v. Trevor, Tit. 32. c. 22. § 33.

87. The plea of a fine, and long possession under it, is not a good bar to a bill brought for a discovery of the deeds declaring the uses of such fine.

88. William Lord Brereton, being seised in fee of the impropriate rectory of Middlewich, and of the advowson and vicarage of the said church, as appendant to the rectory, agreed with Robert Lowe to convey the same to him; and, in pursuance of this agreement, the said William Lord Brereton and Elizabeth his wife, and William, their son and heir apparent, in 1664, levied a fine *sur conusance de droit come ceo, &c.* in consideration of 1000*l.* therein mentioned to be the purchase-money, in the court of the county palatine of Chester, to the said Robert Lowe, and to Edward Minshall, Gabriel Hodgson, and John Wilson, (who Holt v. Lowe, 5 Brown Parl. Ca. 569.

all three died in Lowe's lifetime), and to the heirs of the said Robert Lowe. About the year 1702, Samuel Lowe, the son and heir of Robert Lowe, presented a clerk to the vicarage of Middlewich, who was instituted and inducted, and continued in possession till his death, which happened in the year 1718, when Francis Lord Brereton presented his clerk to the vicarage, who was instituted and inducted. James Lowe, the respondent's brother, brought a writ of *quare impedit*, but, before the matter was determined, the incumbent died, and the respondent Lowe presented his clerk, who was instituted and inducted; and the appellants brought their writ of *quare impedit*, to recover that turn of presentation, claiming the same under a conveyance from the family of Brereton. The respondent Lowe having pleaded his title to the rectory and vicarage under the purchase and fine above mentioned, the appellants, in Easter term 1734, exhibited their bill in the Court of Exchequer against the respondent, setting forth, that William Lord Brereton being minded to sell the glebe and tithes of the said rectory, the respondent's grandfather, who was then bailiff to Lord Brereton, prevailed on him, his lady and son, for some small sum of money, to sell and convey to the said Robert Lowe the glebe lands and tithes of the greatest part of the said parish; and other parcels of the said tithes were about the same time purchased by several other persons, and conveyed to them; and the said Robert Lowe, as part of the consideration for the purchase of the said tithes, agreed to take upon himself the payment of the stipend of nineteen marks to the vicar; but neither he nor his son ever pretended or insisted on any right to the advowson of the vicarage, nor ever attempted to present thereto, except in the year

1702, when Samuel Lowe, taking advantage of John Lord Brereton's being then under a commission of lunacy, presented a clerk. The appellants therefore prayed, that the respondent might discover whether there was not some deed wherein the uses of the fine were declared, and whether a subsequent fine of particular parcels of the rectory was not levied in 1667, and deeds executed declaring the uses thereof. In bar to this discovery, the respondent pleaded the purchase so made by Robert Lowe his grandfather, and the fine thereupon levied to him of the said rectory, and the advowson of the said vicarage; and also the payment of the said sum of 1000*l.*, the purchase-money mentioned in such fine. That proclamations were duly made on the said fine, and that no claim was made to the premises within five years next after. That the respondent, and those claiming under him, enjoyed the premises for fifty years and upwards, and insisted on the statute of limitations.

On the 9th of November, 1784, this plea came on to be argued before the Barons, when they ordered that the plea should be allowed. An appeal was then brought in the House of Lords; and, on behalf of the appellants, it was argued, that the fine insisted by the plea to have been levied to Robert Lowe, Minshall, Hodgson, and Wilson, was not levied with an intention to convey the rectory to the conusees for their own use, but only to clear the title to the rectory, which was then intended to be sold in parcels; and as there did not appear to be any declaration of the uses of this fine, it would, by the rules of law, result to the conusors. That the end of the bill was to discover the intent and design of the said fine, and of a subsequent fine, said to have been levied in 1667 to the said Robert Lowe, of divers parcels of the said rectory; and

by the discovery of this second fine, and the uses of it, and the consideration of such conveyance, to show that the uses of the first fine did result to the conusors, or at least as to such parts of the rectory as were not particularly conveyed by the second fine, and the deeds declaring the uses of it; and, therefore, the first fine ought not to have been pleaded in bar to such discovery, without a denial of the particular circumstances charged by the bill, as an evidence of such resulting use. That the respondent, by not answering or denying the several charges in the bill, touching the second fine, and the declaration of its uses, did implicitly admit the same, and that the advowson of the vicarage was not comprized therein; and this admission was a strong evidence against him, to show, that the first fine was levied only for the purposes above mentioned, and that nothing more was intended to pass to his ancestor, than what was particularly comprized in the second fine, and the declaration of the uses thereof. That it did not appear by the plea what was the real purchase-money of the advowson, nor that the same was paid by Robert Lowe, the respondent's ancestor. That the appellants and the respondent derived under the same title, and the right of the appellants to the advowson appeared from the respondent's own conveyances; the pretence, therefore, of his ancestor's being a purchaser, without any notice of the appellant's title, was without foundation. And as to the quiet enjoyment, the fine and non-claim, and the statute of limitations, set up as a bar to the discovery sought by the appellants, it was said, that as to the glebe, and such part of the tithes, parcel of the said rectory, as the respondent claimed, there might have been a long and quiet possession, nor was his title thereto at all impeached by the appellant's

bill; but as to the advowson of the vicarage, the only evidence of enjoyment insisted on by the respondent, was a presentation about the year 1702, which was during the lunacy of Lord John; and, since that time, Lord Francis, his heir, presented the last incumbent, and regained the possession of the vicarage. It was therefore hoped, that the said plea should not bar the appellants of a full discovery of the respondent's title, but that the order for allowing the same should be reversed. On the other side, it was contended, that Robert Lowe, the respondent's grandfather, and under whom he claimed, was a purchaser of the rectory and the advowson of the vicarage, by the fine levied in 1664, for 1000*l.*, without any notice of any other title; and therefore, by the known and established rules and practice of courts of equity, the respondent ought not to be obliged any further to discover or disclose his title; nor were the appellants entitled to the aid of a court of equity in respect to such title. That by the fine, proclamations, and non-claim thereupon, and by the length of peaceable possession and enjoyment, which the respondent's grandfather, father, and brother, and those claiming under them, had successively of the said advowson, under the said fine and purchase; the title under which the appellants, by their bill, claimed the same, was utterly and effectually barred and defeated both at law and in equity; and, therefore, the order for allowing the plea ought to be affirmed, and the appeal dismissed with costs. After hearing counsel on this appeal, it was ordered and adjudged, that the order therein complained of should be reversed; and that the plea should stand for an answer, with liberty to except so far, as to oblige the respondent to discover any conveyance or conveyances made by William Lord Bre-

reton and Elizabeth his wife, and William Brereton, Esq. their son, or any or either of them, to Robert Lowe, the respondent's grandfather, alone, or jointly with any other person or persons; and to discover any deed or deeds, declaring the uses of a fine, in the pleadings mentioned to be levied in the 16th year of King Charles II., or declaring the uses of a fine in the pleadings also mentioned to be levied in the vear 1667.

89. Although a bill in equity is not such an action as will avoid a fine, if the subject matter of the suit be of legal jurisdiction; yet still, in some instances, the filing a bill in a court of equity will prevent the bar arising from a fine and non-claim. And in cases of this kind, the Court will direct a trial at law, with an order that the defendant shall not set up the fine in bar of the plaintiff's claim; upon the same principle that a court of equity sometimes directs that the defendants in a suit of law shall not plead the statute of limitations.

2 Atk. 389.

Pincke v. Thornycroft, 1 Bro. Rep. 289. 4 Bro. Parl. Ca. 92.

90. Sir John Thornycroft, Bart. being entitled to the remainder in fee of the estates in question, expectant on the decease of his sister Elizabeth, the then wife of General Handasyde, devised the same to Henry Forster in fee. After the decease of Sir John Thornycroft, disputes arose between Mrs. Handasyde (who was heir at law of Sir John Thornycroft) and Mr. Forster, respecting the validity of this will, which were compromised, and Mr. Forster, in consideration of 630*l.*, conveyed all his interest in the estates devised by the said will to General Handasyde and his wife in fee as joint tenants. Mrs. Handasyde survived her husband, and, having no issue, she devised, among other estates, "her estate and manor of Stockwell in the parish of Lambeth, in the county

of Surry, and all thereunto belonging, to Henshaw Thornycroft, and his heirs male ;" and appointed him her executor. Upon the death of Mrs. Handasyde, Henshaw Thornycroft entered into possession of all the estates whereof she was seised, among which was a farm situated in the parish of St. Mary Newington, but which was not within the manor of Stockwell, and therefore did not pass by the will ; and in Hilary term 1773, levied a fine and suffered a recovery of all those estates, in order to bar the entail. Previous to this, Elizabeth Pincke and Ann Thornycroft, who were the heirs at law of Mrs. Handasyde, filed their bill in the Court of Chancery against Henshaw Thornycroft, praying, that the said Thornycroft might set forth the dates and short contents of all the deeds, evidences, and writings in his custody or power, relating to the estates whereof Mrs. Handasyde died seised; and that he might likewise set forth and discover of what lands of the said Mrs. Handasyde he was in possession, which were not comprised in her will, and for an account of the rents and profits of the said premises received by him since the decease of Mrs. Handasyde, and for a delivery of all deeds relating thereto. The defendant, by his answer, denied being in possession of any estates belonging to Mrs. Handasyde, but what were comprised in her will. The heirs at law soon after discovered, that the farm at Newington was not devised by the will, and therefore brought an ejectment for the recovery of it. Notice of trial having been given just before the Summer assizes 1778, a few days before the trial was to come on, the solicitor for the defendant informed the solicitor for the plaintiff of the will of Sir John Thornycroft, and that the production of that will, and setting up the title of Henry

Forster under it, would nonsuit the plaintiff in ejectment; but did not mention the fine or the deed by which Forster's title was conveyed to Mrs. Handasyde, that deed being in fact not then discovered. The heirs at law gave notice of trial for the Lent assizes 1779, when Henry Thornycroft set up the fine and non-claim; and there having been no actual entry, the plaintiffs were nonsuited. Upon this, the plaintiffs filed a bill of revivor and supplement, praying, that under these circumstances, the defendants might be restrained from setting up the fine in any manner to the prejudice of the plaintiffs. The case was heard before the Lords Commissioners Loughborough, Ashhurst, and Hotham; and on behalf of the plaintiffs it was contended, that they should have proceeded to trial at the Summer assizes 1778, which was before the expiration of the five years, if they had not been prevented by the information of the solicitor; and, therefore, this was a proper case for the interference of a court of equity. They insisted further, that the filing of the bill in the Court of Chancery was of itself sufficient to prevent the bar, arising from the fine and non-claim, taking place.

For the defendants, it was urged, that there was no impropriety in the solicitor's conduct; that the Court would not interfere to prevent the operation of a fine, unless in cases of fraud; and that the bill being, in substance, a mere bill for discovery, could not operate to prevent the bar arising from the fine.

Lord Loughborough.—"If it were made out that the plaintiffs were prevented from trying their cause by fraud, I should think, under the principles of this Court, the defendants ought to be restrained from setting up the fine as a bar; but here the plaintiffs take it for granted that a bill filed in this Court,

for any purpose, will prevent the statute of limitation, or a fine, barring. All legal interests are bound by the fine; if the subject-matter of the suit be of legal jurisdiction, the bringing a suit in equity will not bar the operation of the fine. If a demand of a debt be made here, if it be a legal debt, this Court being applied to for a discovery, will not prevent the statute of limitations from running; but if it be for payment out of assets, for which this is the proper jurisdiction, there the filing of the bill is the commencement of a proper suit. I do not say that a case may not exist, where the bad faith of parties may make a ground to prevent a fine from barring; but here was only a communication of the truth of the case; the attorney stated all he knew: it was not his duty to give notice of the fine. It was not in proof that it was in consequence of this they did not try the cause: it was their own judgment that decided upon it. A legal bar has taken place in consequence of a legal provision; whether that provision be wise or not, it must bind. No hardship has occurred, in consequence of which they can say, that in conscience the fine should not be set up. This is a legal title, over which this Court has no jurisdiction, and no fraud has intervened. The bill must therefore be dismissed."

Lord Commissioner Ashurst.—"I am of the same opinion: where a bill is filed, with a prayer for equitable relief, the policy of the law suspends the statute of limitations; just as in the case of the commencement of an action. But, with respect to a fine, the case is different; the bringing an action is not sufficient to bar the operation without an actual entry; no more can the bringing a suit here be so, unless the entry was prevented by fraud. In any

other case, the filing the bill cannot prevent the bar; and, in this case, there was no fraud, but a fair disclosure."

Lord Commissioner Hotham.—"If the filing of the bill is not a sufficient bar, it will stand on the circumstances of the case. It was a mere bill of discovery, which is not sufficient. If the circumstances are such, that there had been an imposition on the party, I think the Court should interpose; but it was a fair candid conversation." The bill was dismissed.

An appeal was brought from this decree to the House of Lords; and, on behalf of the appellants, it was said, that it belongs to the jurisdiction of courts of equity, not only to give relief where the party entitled to the lands has a title only in equity, but also where the plaintiff in equity has the legal estate, and can recover at law, provided the deeds which are evidence of his title are in the hands of the defendant in possession of the lands. The Court, in such cases, relieves, by decreeing a production of the deeds upon a trial at law, by restraining the defendant from setting up satisfied terms; and (in case an account of the rents is also prayed) will, after a recovery at law, by the aid of the Court, decree an account of rents and profits. In like manner, where the plaintiff has the title at law, and can make it out at law, without any aid from deeds in the defendant's hands, yet, if the defendant has in his hands an instrument which will defeat the plaintiff's legal title, and has also another instrument in his hands which will restore the plaintiff's title, equity will either decree the defendant not to give the first instrument in evidence at law, or to produce both. This is the present case: for the plaintiffs, as heirs of Eliza-

beth Handasyde, could make out their title at law to the lands, which did not pass by her will, without any aid, by proving their pedigree: but it was in the power of the defendants to nonsuit the plaintiffs, by showing, that Sir John Thornycroft was in his lifetime seised of the estate in question, and that he devised it to Forster, whereby Elizabeth, his sister and heir at law, was disinherited. But by the conveyance of 1745 from Forster to Elizabeth in fee-simple, and the production of it at law, the plaintiffs would be reinstated in their title as heirs to Elizabeth. The original bill was brought for a production and inspection of all the title-deeds by the heirs of Elizabeth Handasyde against the devisee, to which production the heir was entitled. And the plaintiffs presuming that some aid of the Court might appear to be finally necessary to try the title at law, the bill prayed an account of rents and profits, and delivery of the deeds belonging to the descended estates. In the course of pursuing and obtaining this discovery, it came out, that Sir John Thornycroft the son made a will, and devised to Forster; and it also came out by the last answer, that Forster had conveyed to Elizabeth Handasyde in fee. It also came out, that the lands in question were comprised in an old settlement 1722, and in a term of five hundred years thereby created for raising annuities, which have been satisfied, but the term remained outstanding; subject to which term, Sir John Thornycroft, the son, took the lands in question. So that it was undoubted, that if there were no other circumstances in the case, the Court had a jurisdiction, and should have decreed upon the hearing of the cause, that the bill should be retained, with liberty for the plaintiff to bring an ejectment, that

the defendants, the devisees, should not set up the term of five hundred years; and in case the will of Sir John Thornycroft the son should be produced in evidence, the defendants should likewise produce at the trial the deed of 1745; and that all further directions should be reserved till after the trial was had. The only circumstances in the present case which differed from the above, and which were the grounds of dismissing the bill, were, that in Hilary term 1773 (the next after the death of Elizabeth Handasyde), the devisee levied a fine of all the devised estates, and also of the descended estates (having entered upon both immediately after her death). The original bill was filed in 1776. The five years non-claim ran from Michaelmas 1778. In October 1781, the answer came in which discovered the deed of 1745, and admitted it to have been in the hands of the devisee from the time of the death of Elizabeth Handasyde; and the answer also stated and insisted upon the fine and non-claim. The cause was heard the first of July 1783, at which time the Court should have added to the directions above mentioned, that the fine and non-claim should not be insisted upon at law, instead of dismissing the bill upon the ground of such fine and non-claim only, as the non-claim had elapsed pending the suit in Chancery; and therefore the Court ought not to have permitted the defendant to take advantage of it at law. For a court of equity will not suffer the rights of the parties to be changed, pending the suit, in a case within the jurisdiction of the Court, and where the Court can relieve; therefore, if a trust estate is before the Court in a *lis pendens*, and a sale be made of the trust estate, without actual notice of the cause to the purchaser, the Court, at the hearing, will de-

cree the relief against the purchaser which the plaintiff in the cause was entitled to. But it is otherwise after the cause is at an end, for then the party must have express notice of a decree, as he must of a judgment at law, to affect him with equity. So, in the case of a fine, equity will not suffer a non-claim completed, pending the cause, to prevent the Court from doing equity; otherwise (as Lord Hardwicke expressed it in 2 Atk. 390.) it would trip up the jurisdiction of this Court, if you will not allow, where it is a proper matter of equity, a bill to prevent the running of a fine. So where a court of equity has directed an action, the defendant has been restrained from setting up the statute of limitations, which has run pending the suit in equity.

On the other side, it was contended, that the title of the appellants, if they ever had any, was a clear title at law; it needed no assistance of a court of equity to bring it to a fair discussion: and, accordingly, the mother of the appellant Pincke and the appellant Thornycroft brought an ejectment, which might have been fairly tried without any such assistance; and there was now no obstacle to a legal determination of the rights of the appellants, except the fine. That there was no ground for a court of equity to interpose, to remove the legal bar created by the fine. It was apprehended the farm at Newington was devised by the will; but, supposing the contrary, there was not in the case any circumstance which could give a court of equity a control over the legal title of the respondents, nothing which could form a legal obligation upon their conscience, not to set up the fine. The appellants attempted to impute fraud to the respondents or their solicitor; but the bill did not state such a case as warranted

the imputation, much less was it made out in proof. A fine was a matter of record open to the inspection of every one; the Legislature had given it an operation to bar all claims not asserted in due time; and it was therefore the duty of every person having a claim, to inform himself whether there might be such an impediment to the assertion of it. Not disclosing to an adversary that a fine had been levied, which might in time be a bar to his claim, could not be deemed a fraud. It was endeavoured, therefore, to give to the conversation of the solicitor for the defendant and the solicitor for the plaintiff in the ejectment (of which there was no evidence but the answers), such a turn as might make it appear something like fraud. But the solicitor for the defendant merely mentioned a claim made by persons to whose apparent title he was then unable to give any answer, and which had therefore excited in his mind much apprehension for his client's title; and what he communicated was not only true, but (according to the information he then had) was the whole truth, though a subsequent accidental discovery put an end to this alarming claim, which, if it had prevailed, was superior to the title of the heirs, as well as of the devisee of Mrs. Handasyde. It was true, the heirs countermanded their notice of trial of the ejectment; but their own judgment decided their conduct. It was asserted by the appellants, that if the ejectment had proceeded to trial, the fine must have been discovered, and, five years not having then elapsed from the last proclamation, the heirs might have entered to avoid the fine. But this assertion was not founded in truth; the will of Sir John Thornycroft would have been a sufficient defence, and there would have been no necessity for setting up the fine.

It was ordered and adjudged, "That the said decree or order of dismission complained of in the said appeal should be reversed. And it was further ordered and adjudged, that the bill should be retained for twelve months, and that the plaintiffs should be at liberty, in the meantime, to bring such action or actions at law as they should be advised, &c. And it was further ordered and adjudged, that the said defendant Edward Thornycroft should not insist, in such action or actions, or on any trial to be had thereon, on the fine mentioned in the pleadings, or on any non-claim which had ensued thereon, or any other fine or non-claim which might have incurred since filing the original bill."

TITLE XXXVI.

COMMON RECOVERY.

CHAP. I.

Of the Origin and Nature of a Recovery.

CHAP. II.

Of the Writ of Entry and the Tenant to the Præcipe.

CHAP. III.

Of Voucher, Judgment, and Execution.

CHAP. IV.

In what Courts and of what Things a Recovery may be suffered.

CHAP. V.

Of the Parties to a Recovery.

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Of the Amendment of Recoveries.

CHAP. VII.

Effect of a Recovery in barring Estates Tail, Remainders, and Reversions.

CHAP. VIII.

Effect of a Recovery in barring particular Persons, Estates, and Interests.

CHAP. IX.

Of some other Effects of a Recovery.

CHAP. X.

What Persons, Estates, and Interests are not barred by a Recovery.

CHAP. XI.

How Recoveries may be reversed and avoided.

CHAP. I.

Of the Origin and Nature of a Recovery.

1. *Origin of Recoveries.*
9. *Manner in which they are suffered.*

SECTION 1.

A RECOVERY, in its most extensive sense, is the restoration of a former right, by the solemn judgment of a court of justice; and judgments, whether obtained after a real defence made by the tenant, or upon his default, or feint plea, have equally the same force and efficacy to bind the right of the land so recovered, and to vest a free and absolute estate in fee simple in the recoveror. Origin of Recoveries. 2 Inst. 321.

2. A common recovery is a judgment obtained in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit. Bac. Tracts, 148.

3. A common recovery departs so far from the original modes of transferring property, and is in itself so complicated and artificial, that if we had no historical evidence of the time when it was first adopted among the common assurances of the law, we might safely pronounce it to be in some respects a modern
Plowd. 43. invention. But the fact is well known that we are indebted to the ingenuity of the ecclesiastics for the introduction of common recoveries, in order to evade the statutes of mortmain, by which they were prohibited from purchasing, or receiving under pretence of a free gift, any lands or tenements whatever.

4. To effect this purpose the religious houses used to set up a fictitious title to the lands intended to be given or sold, and brought an action against the tenant to recover them; the tenant by collusion made no defence, whereby judgment was given for the religious house, which then recovered the lands by sentence of law, upon a supposed prior title. And although proceedings of this kind were carried on by a
2 Inst. 429. species of conventional fraud, between the religious house and the tenant of the land; yet the Judges held, that in these cases the religious communities did not appropriate such lands *per titulum doni vel alterius alienationis,* as the statute *de religiosis,* 7 Edw. I. expresses it; and that they were not within the words, *aut alio quovismodo arte vel ingenio.* For as recoveries were prosecuted in a course of law, they were presumed to be just; and it was accordingly held that they were not within the statute.

5. The notoriety and evidence which attended feigned recoveries was such, that they were not used by the ecclesiastics alone, but were soon adopted by lay persons, as a common mode of transferring lands. Thus it appears by the statute of Gloucester 6 Edw. I.

that feigned recoveries were at that time in constant use; for it is provided by the 11th chapter of that statute, that a termor for years might falsify a feigned recovery, suffered by the owner of the inheritance. 2 Inst. 321.

6. The want of moderation on the part of the ecclesiastics counteracted the effects of their ingenuity; being gratified by the success of their practices, they had such frequent recourse to feigned recoveries, as to occasion a parliamentary interference; for, by the statute of Westminster 2, 13 Edw. I. c. 32. it was enacted, that in all cases where ecclesiastical persons recovered lands by default, a jury should try the right of the demandants to the land, and if the religious house was found to have a title, they should recover seisin, otherwise it should be forfeited to the immediate lord of the fee, in the manner directed by the statute *de religiosis*. 2 Inst. 429.

7. In consequence of this statute, feigned recoveries seem to have been disused for a considerable time; nor were they again brought into general practice until some centuries afterwards, when they were resumed as a mode of evading the strictness of the statute *De donis conditionalibus*.

8. Many attempts had been made by the people to procure a legislative repeal of this offensive and impolitic statute, which were constantly and successfully opposed by the great barons; but as the inconveniences arising from entails were so manifest, the ingenuity of the Judges was continually exerted in contriving different modes of evading them. At length a case arose in 12 Edw. IV. in which it was in effect determined, upon principles which will be explained in a subsequent chapter, that a common recovery, suffered by a tenant in tail, should operate as an Tit. 2. c. 2. § 44.

effectual bar to his estate tail, and also to all the estates in remainder, and to the reversion depending thereon. From that time common recoveries have become extremely frequent, and have ever since been considered as common assurances, by means of which tenants in tail are enabled to bar their estates tail, and to convert them into estates in fee simple.

Willes R. 451.

Manner in which they are suffered.

9. A common recovery being a judgment obtained in a real action, although it be fictitious, yet the same mode of proceeding must be pursued, and all those forms strictly adhered to, which are necessary to be observed in an adversary suit. For as Pigot observes, though common recoveries are, to some intents, deemed fictitious proceedings, yet it is necessary there should be *actores fabulæ*.

10. The first thing, therefore, necessary to be done in suffering a common recovery is, that the person who is to be the demandant, and to whom the lands are to be adjudged, should sue out a writ, or *præcipe*, against the tenant of the freehold; whence such tenant is usually called the tenant to the *præcipe*.

11. In obedience to this writ, the tenant appears in court, either in person or by his attorney; but instead of defending the title of the land himself, he calls on some other person, who upon the original purchase is supposed to have warranted the title, and prays that that person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those which he shall lose by defect of his warranty. This is called the voucher, *vocatio*, or calling to warranty.

12. The person thus called to warrant, who is usually called the vouchee, appears in court, is impleaded, and enters into the warranty; by which

means he takes upon himself the defence of the land. The demandant then desires leave of the Court to imparl, or confer with the vouchee in private, which is granted of course. Soon after the demandant returns into court, but the vouchee disappears, or makes default; in consequence of which it is presumed by the Court that he has no title to the lands demanded in the writ, and therefore cannot defend them; whereupon judgment is given for the demandant, now called the recoveror, to recover the lands in question against the tenant, and for the tenant to recover, against the vouchee, lands of equal value, in recompence for those so warranted by him, and now lost by his default.

13. This is called the recompence of recovery in value; but as it is customary to vouch the crier of the Court of Common Pleas, who is hence called the common vouchee, the tenant can only have a nominal, and not a real recompence for the land thus recovered against him by the demandant.

14. A writ of *habere facias* is then sued out, directed to the sheriff of the county in which the lands thus recovered are situated; and on the execution and return of this writ, the recovery is completed.

15. The recovery here described is with a single voucher; but a recovery may and is frequently suffered with double, treble, or farther voucher, as the exigency of the case may require; in which case there are several judgments against the several vouchees.

16. In a recovery with double voucher the tenant in tail conveys an estate to some indifferent person, against whom the writ is brought; this person being tenant to the *præcipe*, vouches the tenant in tail, who

vouches over the common vouchee, upon whose default judgment is given for the demandant against the tenant to the *præcipe*, and for the tenant to the *præcipe* against the tenant in tail, and for the tenant in tail against the common vouchee.

TITLE XXXVI.

RECOVERY.

CHAP. II.

Of the Writ of Entry and Tenant to the Præcipe.

2. *Writ of Entry.*
7. *Construed favourably.*
10. *Tenant to the* Præcipe, *who must have the Freehold.*
22. *At what Time the Tenant must have the Freehold.*
26. *Leases for Lives need not be surrendered.*
29. *But Persons having a prior Estate for Life must join.*
31. *A Surrender is sometimes presumed.*
38. *How a Tenant to the* Præcipe *may be made.*
39. *By Fine.*
44. *Though no Use declared.*
47. *A Husband seised* Jure Uxoris *may alone make a Tenant to the* Præcipe *without Fine.*
51. *Feoffment.*
53. *Grant.*
54. *Bargain and Sale enrolled.*
55. *Lease and Release.*
56. *A Recovery good after 20 Years, though the Deeds to make a Tenant to the* Præcipe *are lost,*
56. *A Recovery sometimes good without a Tenant to the* Præcipe.

Section 1.

IT appears from the preceding chapter, that the following circumstances are necessary to the suffering of a common recovery. First, that a proper writ be sued out: Secondly, that the person against whom the writ is brought be actual tenant of the freehold: Thirdly, that such tenant do vouch over some other person: Fourthly, that judgment be given for the demandant against the tenant, and for the tenant against the vouchee: and Fifthly, that the recovery be executed by the sheriff of the county.

in which the lands lie. I shall now proceed to explain more particularly those different circumstances.

Writ of Entry. 3 Rep. 3 *a.*

2. A common recovery being a real action, cannot of course be regularly commenced without a proper original writ; but may be suffered on any writ by which lands are demandable. The writ which is now usually sued out for that purpose is a writ of entry *sur disseisin*, in the nature of an assise, which is properly grounded on a disseisin done to the demandant himself; it may be brought in the *per*, the *per* and the *cui*, and the *post*; and in common recoveries it is always brought in the *post*. And the reason why this writ was chosen for the purpose of suffering common recoveries was, because the tenant may, in this species of action, vouch at large, and is not bound to vouch within the degrees of the *per*, the *per* and the *cui*, and the *post*; so that it is the safest action for purchasers, who need not fear writs of error for wrong or illegal vouchers.

2 Inst. 154. Booth, 176.

3. There is a fine payable to the Crown at the Alienation office, upon suing out a writ of entry, of the same kind as the fine payable on suing out a writ of covenant to levy a fine.

Tit. 35. c. 2. § 16.

4. If a recovery be suffered without an original writ, it is not absolutely void, but only voidable.

3 Rep. 3 *a.*

5. A common recovery was suffered, but no writ of entry was filed; in consequence of which a writ of error was brought. It was moved, that it might be examined whether any writ of entry had been filed or not; but the Court denied it: though if it appeared upon record that a writ had been filed, then they would consider whether a new writ should be filed or not; and it was said, that if a recovery was exemplified, pursuant to the statute 23 Eliz. though some part of it was lost, yet it would be aided.

Anon. Lit. Rep. 299.

6. By a rule of the Court of Common Pleas, Trin. 30 Geo. III. it is ordered, that from and after the first day of Michaelmas term then next ensuing, in every common recovery wherein the vouchee or vouchers shall appear at the bar of that Court, for the purpose of suffering such recovery, the writ of entry shall be sued out and produced at the time of the recording of the vouchee's or voucher's appearance at the bar, at the foot of the *præcipe* in such recovery. H. Black. R. 1. 526.

7. The writ on which a recovery is suffered, ought to be similar in every respect to a writ which is sued out for the purpose of commencing an adversary suit. The courts, however, make a distinction between a *breve adversarium* and a *breve amicabile*, and will construe the latter in a much more favourable manner than the former. Construed favourably. 2 Roll. R. 67.

8. A writ of error was brought to reverse a common recovery, which had been suffered on a writ of entry in the *post*, of a manor, and of a yearly rent or pension of four marks; and also of an advowson. One of the errors assigned was, that a writ of entry in the *post* does not lie of an advowson. But it was unanimously determined, that the judgment should be affirmed: because a common recovery was not to be compared to a judgment in an adversary suit; as it was by usage and custom become a common assurance and conveyance of lands, and was had by the mutual consent of the parties; *et consensus tollit errorem*. Besides, if it were otherwise, no recovery could be suffered of an advowson, or common in gross, or of many other things; which would be highly inconvenient. Dormer's Case, 5 Rep. 40. Poph. 22.

9. A writ of entry bore date 1st of March, 7 Eliz. and the return was made *die Lunæ quarta septimana* Barton's Case, Pop. 100. Cro. Eliz. 308.

quadragesimæ prox. futur., the said first day of March being the first week of Lent, 7 Eliz.; and upon this it was inferred, that the tenant was not to appear till Monday in the fourth week of Lent, 8 Eliz. which was a long time after the voucher appeared and vouched over; so that the recovery was void, because there was judgment upon a voucher before the return of the writ, till which the Court had no power to proceed. But it was determined that the original writ should be construed, as it was written, to be returnable on Monday in the fourth week of the same Lent, 7 Eliz.; for it should be taken (as it was written shortly) in such a manner as to make the recovery good.

Tenant to the Præcipe, who must have the Freehold.

10. A common recovery being a real action, carried on through all its forms, it is absolutely necessary that the tenant to the *præcipe*, or person against whom the writ of entry is brought, should have an estate of freehold in possession, either by right or by wrong, in the lands demanded by the writ; because if he has not the freehold, it would not be in his power to restore the lands, as the writ directs. And, in common recoveries, there is an additional reason: because, as the demandant can recover nothing against the tenant unless he has the freehold, so the tenant can have no recompence in value against the vouchee for what he has lost; for until the demandant sues out execution against the tenant, the tenant cannot have execution against the vouchee: and if the tenant has nothing in the land, no execution can be sued against him, nor can any recovery in value be had over; consequently, there will be no recompence to bind him, and the recovery will be no bar.

Pigot, 28. Booth, 3.

infra, c. 7.

11. If the tenant to the *præcipe* has the freehold,

at the time when the recovery is suffered, though his estate be afterwards defeated, yet the recovery will be good.

12. Lands were given to an alien in tail, remainder over to another in fee: the alien suffered a common recovery, and died without issue. All this was found by office; and it was contended that the alien was not tenant to the land when the recovery was suffered: but the Court held the contrary, that the recovery was good. Anon. 4 Leon, 84. Goldsb. 82.

13. If a writ of entry is brought against the tenant of the freehold and a stranger, the recovery will be valid; for the recompence in value will go to the person who has really lost the estate. 1 Vent. 358. Paulin v. Hardy, Skin. 3. 63.

14. If there be two joint tenants of a manor, and a writ of entry of the whole manor is brought against one of them, on which a common recovery is suffered, it will only be good for the moiety of the person against whom the writ was brought; but as to the other moiety, it will be void, for want of a tenant to the *præcipe*. Winchester's Case, 3 Rep. 1.

15. It has been long settled, that a devise to executors for payment of debts, and until debts are paid, only gives the executors a chattel interest in the lands thus devised, and therefore does not prevent the disposal or descent of the freehold; so that if, after such a devise, the testator gives the same lands to a person for life, the freehold will vest in such devisee immediately on the death of the testator, and he will be enabled to make a good tenant to the *præcipe*. 1 Inst. 42 *a*. 8 Rep. 96 *a*.

16. So if a testator gives his executors full power to receive the mesne profits of his estates in a particular place, upon trust to pay his debts, and afterwards devises those estates to a person for life, the

freehold will, on the death of the devisor, become vested in such devisee for life, and he may make a good tenant to the *præcipe.*

Carter v. Barnardiston, 1 P. Wms. 505. 3Brown Parl. Ca. 64.

17. Thus, where Sir Michael Armyne being seised in fee of several estates in the counties of Huntingdon, Lincoln, &c. made his will, and thereby desired, that his executors would take care to see all his debts and legacies paid, by making sale of his personal estate; and as his debts were great, he devised to his executors all his manors and lands of Cherry Orton and Botolph Bridge, to be by them sold for the most that could be got, and the monies arising from such sale disposed of in the payment of his debts and legacies. And, lest both his personal estate and the monies to arise from such sale should not be sufficient, the testator gave his executors full power to receive the mesne profits of his whole estate lying in Pickworth and Willoughby, in the county of Lincoln. The testator then devised the said manors of Pickworth and Willoughby, after such time as his debts and legacies should be paid by the rents and profits thereof, to Evers Armyne, Esq. for his life, without impeachment of waste; and in case the said Evers Armyne should have any issue male, then to such issue male and his heirs for ever; and after the decease of the said Evers Armyne, in case he left no issue male, then after such time as his debts and legacies were fully paid, he devised the manor of Pickworth to Thomas Style in fee. Evers Armyne, the devisee, having got into possession of the said manors of Pickworth and Willoughby, suffered a common recovery of them before the debts were paid, and declared the uses thereof to himself in fee. This case having been heard in the House of Lords, the Judges were directed to give their opinions, "whether the

estate for life was vested in Evers Armyne at the time of the recovery, before all the debts were paid, so that he could make a good tenant to the *præcipe?*" And the Lord Chief Justice of the Court of Common Pleas, in the name of all the Judges, who had consulted together, delivered their unanimous opinion, "that the estate for life was vested in Evers Armyne at the time of the recovery."

18. It has been sometimes doubted in practice, whether, upon the death of a person whose widow is entitled to dower, the heir can suffer a recovery before assignment of dower, without the concurrence of the widow. No case of this kind has ever, I believe, been determined; but it follows, from the principles laid down by Lord Ch. Baron Gilbert, that such a recovery would be good: for, he says, the law casts the freehold on the heir immediately upon the death of the ancestor; but the law does not cast dower on the wife, for she takes it by her own act. It is true, that when the widow is endowed, the possession which the law casts on the heir is avoided, and the widow is considered as being in from the death of her husband; but still the heir had the freehold until dower was assigned, which is sufficient to support the recovery. Ten. 26. Tit. 6. c. 4. § 1. Lit. § 393.

19. As it is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold, it follows, that those who have not an estate of freehold. cannot suffer a recovery; because they cannot convey a freehold to the person against whom the writ is to be brought.

20. Thus, where a lessee *pour auter vie* made a lease for sixty years, and died in the lifetime of the *cestui que vie;* the person in remainder, being tenant Keb. 735. 785.

in tail, suffered a common recovery, which was held erroneous, for want of a good tenant to the *præcipe*; because, upon the death of the tenant *pour autre vie*, the freehold was cast upon the tenant for years, so that he, or some person claiming under him, ought to have been tenant to the *præcipe*.

Dormer v. Parkhurst, 3 Atk. 135. 6 Brown Parl. Ca. 351.

21. So where lands were limited to Sir Robert Dormer for 99 years, if he should so long live, remainder to trustees and their heirs to preserve contingent remainders, remainder to his first and other sons in tail male. Sir Robert having issue a son, Fleetwood Dormer, they both joined in levying a fine to make a tenant to the *præcipe*, and then suffered a common recovery. The principal question in this case was, whether the freehold passed to the trustees, there being a considerable error in the words by which the remainder was limited to them? And the Court having determined, that the freehold did pass to the trustees, they concluded that the recovery was void; for if it was considered as the recovery of Robert Dormer, it was void, because he, being only tenant for years, could not give a freehold to another, without which there could not be a good tenant to the *præcipe*; for, to make him so, he must have a freehold in him. And, taking it as the recovery of Fleetwood the son, it could not be good, the freehold being in the trustees, and not in him, he having only a remainder expectant on the determination of their estate. And as to the fine levied by Robert Dormer and Fleetwood, it stood thus:—Considered as the fine of Robert, it was void for want of a freehold; it being settled beyond all doubt, that a fine by tenant for years operates nothing, and was absolutely void: and, considered as the fine of

Fleetwood, it was equally so for want of a freehold in him; it being equally clear, that none can levy a fine but he who has a freehold in possession.

At what time the Tenant must have the Freehold. 1 Mod. 218.

22. It appears to have been formerly held, that the tenant to the *præcipe* should have the freehold when the writ was sued out; but it was afterwards determined, that if he acquired the freehold at any time before judgment was given, it would be sufficient.

Lacey v. Williams, Rep. temp. Holt, 614. 2 Salk. 568. 1 Ld. Raym. 227. 475. Carth. 472.

23. Thus, in ejectment, it appeared by a special verdict, that the tenant to the *præcipe* had not acquired the freehold until after the *teste* of the writ of *summoneas ad warrantizandum*; so that he was not seised of the freehold at the return of the writ of entry. The Court of Common Pleas determined, that the recovery was valid. A writ of error was brought in the Court of King's Bench; and it was contended, on the part of the plaintiff in error, that the recovery was void; because, although a common recovery was a common assurance, yet it had forms peculiar to itself, which ought to be observed. In supposition of law, the tenant ought to have the lands at the time of suing out the writ, otherwise he cannot render them, as the writ supposes. The Court supposes the tenant to be seised of the lands; otherwise, to what purpose are the lands demanded from him? The voucher supposes that the tenant has seisin of the lands; for it would be absurd that the tenant should vouch another person to warrant lands to him which he has not. On the other side it was argued, that in all cases of adversary actions, although the person against whom the writ was brought was not tenant at the time of the *teste*, but became tenant before the return, it was sufficient. If the tenant to

the *præcipe* was not seised at the return of the writ, he might avoid it by pleading non-tenure; if instead of that he vouched over, then he admitted the writ to be good as to himself, but still the vouchee might counterplead the tenancy; if he did not, the recovery would be good by estoppel against the parties to it; however, in such a case, the tenant to the *præcipe* could not recover over in value, because he had lost nothing; but if the tenant acquired the lands after the voucher, and judgment was given against him, it would bind the land; and as the tenant had lost the land, he would recover in value against the vouchee: so that the recovery would be effectual. This being the law in adversary suits, it ought certainly to be so in common recoveries, which the Judges take notice of as common assurances, and which they will always support, if possible.

It was adjudged that this recovery was good; and Lord Chief Justice Holt said, the general rule was, that if the tenant to the *præcipe* acquired the freehold at any time before the judgment was given, it was sufficient; because it cannot then be said, that the recovery was had against a person who had nothing in the lands: and it was not enough in a counterplea of voucher to say, the voucher had nothing in the lands at the time of the voucher, without adding *nec unquam postea;* therefore a writ might be made good by a subsequent purchase, so might a voucher; which was the more reasonable, because the demandant might have a good cause of action, although the tenant had not the land when he commenced his suit; so that it was sufficient, in law, if the tenant had the land to render at any time before judgment.

Sambourn v. Belke, 1 Show. 347. S. P.

24. By the statute 14 Geo. II. c. 20. § 6. it is enacted, that from and after the commencement of the said act every recovery already suffered, or thereafter to be suffered, shall be deemed good and valid to all intents and purposes, notwithstanding the fine, or deed or deeds, making the tenant to such writ, should be levied or executed after the time of the judgment given in such recovery, and the award of the writ of seisin as aforesaid; provided the same appear to be levied or executed before the end of the term, great session, session or assises, in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same as aforesaid.

25. In ejectment, the jury found a special verdict that Sarah Williams, being tenant in tail of the premises in question, conveyed the same by lease and release, dated the 19th and 20th of November 1778, to a person to make him tenant to the *præcipe*, in order that a common recovery might be suffered, which was accordingly suffered, and a writ of seisin awarded, tested the 6th of the same month of November, returnable in 15 days of St. Martin; to which the sheriff returned, that he, by virtue of the said writ, on the 10th of November in the same term, did cause full seisin of the premises therein mentioned to be delivered to the demandant. It was contended, that this recovery was void, for it appeared upon the record, that seisin was delivered by the sheriff ten days before the date of the conveyance to the tenant of the freehold, when, in fact, Sarah Williams was in possession of the lands; and that this case was not within the statute 14 Geo. II. c. 20. § 5. which arose from the fictitious relation

Goodright ex dem. Burton v. Rigby, H. Black. Rep. vol. 2. 46.

to the first day of the term, and was made for a different purpose; viz. to prevent recoveries being set aside where the tenant to the *præcipe* was created by deed executed after the award of the writ of seisin. The words of the 6th section of the act were, "executed after the time of the judgment given and the *award* of the writ of seisin." But there was a material difference between the *award* and the *execution* of the writ; and the 7th and 8th sections expressly provide, that the act should not be extended beyond its strict limits. The counsel on the other side were stopped by the Court, who said, that though there might have been some doubt, if it had been found a fact, that seisin was actually given on the 10th of November, yet the day named in the return was immaterial; for it was not necessary to name any particular day, and the return would have been good without it. All that was necessary was, that seisin should be delivered after the judgment, and before the return of the writ, and that the proceedings should all be in the same term. That those requisites were complied with in the present case, which was directly within the statute 14 Geo. II. § 5 & 6. As, therefore, the day mentioned in the sheriff's return was repugnant to the rest of the proceedings, it was to be rejected, and there must be judgment for the defendant.

Pigot, 58. Wilson on Fines, 348.

A writ of error was brought upon this judgment in the Court of King's Bench. Lord Kenyon observed, that the sense of the clause in the statute 14 Geo. II. was, that the recovery should be valid, provided the deed making a tenant to the *præcipe* was executed before the end of the term in which the recovery was suffered; and it appeared upon this

Durnford and East's Rep. vol. 5. p. 177.

verdict, that the deeds making the tenant to the *præcipe* were executed within the term. And though the statute, in enumerating some of the defects for which remedy was to be applied, does not mention this particular defect, it has always been understood, that the act was intended to remedy every defect of this kind, provided that which is there made a condition be complied with, namely the making of the tenant to the *præcipe* before the end of the term in which the recovery is suffered; nor could the words of the statute be satisfied by any other construction. The other Judges concurred in opinion with the Lord Chief Justice, and the judgment was affirmed.

A writ of error was then brought in the House of Lords, where the judgment was affirmed.

Leases for Lives need not be surrendered.

26. It is not only necessary for a person who suffers a common recovery to have an estate of freehold in the lands, but it is also necessary that it should be an estate in possession; for the person against whom the writ is brought must be actual tenant in possession of the freehold; so that it frequently happens, that persons who are entitled to estates of inheritance in lands, are notwithstanding disabled from suffering common recoveries of them, in consequence of their not having a freehold in possession. This happens in two cases: first, where the lands are let out on leases for lives: and secondly, where there is an estate for life prior to their estate of inheritance.

27. Before the statute of *quia emptores*, subfeudations, whereon rents and services were reserved, did not prevent a writ of entry from lying against the lord of the seigniory. When common leases to

1 Burr. 115.

farmers for one or more life or lives, reserving rent came in use, they resembled subinfeudations, and therefore ought not to have prevented the *præcipe* from being brought against the owner of the freehold under which the leases were granted; but it was thought necessary and became usual for the person who intended to suffer a recovery, to get conditional surrenders from the lessees for life, in order to become seised of a freehold in possession, and be thereby enabled to make a good tenant to the *præcipe*.

28. This practice was productive of several inconveniences; the lessees for life were sometimes unwilling, and frequently unable, from want of age or understanding, to make such surrenders; and it being in some instances doubtful in whom such leases for lives were vested, the statute 14 Geo. I. c. 20, reciting that several leases had been and were likely to be made of honours, &c. for one or more life or lives, under particular rents thereby reserved and to be reserved; and that procuring surrenders of such freehold leases, or the tenants to join, frequently occasioned great trouble, difficulty, and expence to tenants in tail; it is therefore enacted, § 1, "That all common recoveries suffered or to be suffered in His Majesty's Court of Common Pleas at Westminster, or in any court of record in the principality of Wales, or in any of the counties palatine, or in any other court having jurisdiction of the same, of any honours, castles, manors, lands, tenements, or hereditaments, without any surrender or surrenders of such lease or leases, or without the concurrence or any conveyance or assurance from such lessee or lessees, in order to make good tenants to such writs of entry or other writs, whereupon such recoveries

have been or shall be had or suffered, shall be as valid and effectual in law, to all intents and purposes whatsoever, as if such lessee or lessees, or any other person or persons claiming under him, her, or them, had conveyed or joined in conveying, or shall convey or join in conveying, a good estate of freehold to such person or persons as has or have been, or shall become tenant or tenants to such writs of entry, or other writs whereupon such common recoveries have been or shall be suffered."

But Persons having a prior Estate for Life must join.

29. Although the above statute has made the surrender of leases for lives unnecessary, yet it does not extend to estates for life, prior to the estate of which a recovery is intended to be suffered; such estates must therefore still be surrendered to the person against whom the writ of entry is brought; for this case is expressly excepted in the statute 14 Geo. II. c. 20., it being thereby provided, § 2, "That nothing in that act contained should extend or be construed to extend to make any common recoveries valid and effectual in law, unless the person or persons entitled to the first estate for life, or other greater estate, in case there was no such estate for life in being, in reversion or remainder, next after the expiration of such leases, has or have by some lawful act or means, conveyed or assured, or joined in conveying or assuring, or shall by some lawful act or means convey or assure, or join in conveying or assuring, an estate for life at the least to such person or persons as has or have been, or shall become tenant or tenants to the writ of entry, or other writs whereupon such common recoveries have been or shall be suffered."

Pigot, 50.

30. The prior estate for life ought to be surrendered to the person who has the remainder or reversion,

before he makes a tenant to the *præcipe*. But if the surrender is made after the execution of the deed, by which the lands are conveyed to the person who is to be tenant to the *præcipe*, it must then be made to him, otherwise it will be void; because the person who is to suffer the recovery has then no reversion in him for the surrender to operate upon.

A Surrender is sometimes presumed.

31. Common recoveries having long been considered as common assurances of lands, and in the nature of conveyances by consent, the Judges have sometimes presumed, in consequence of particular circumstances, that the tenant for life had surrendered his estate, though no surrender was actually proved; and therefore, where the possession has accompanied a recovery for a long time, the Court will presume a surrender by the tenant for life.

Green v. Froud, 1 Vent. 257. 1 Mod. 117.

32. In an ejectment upon a trial at bar for lands held in ancient demesne, a recovery in the court of ancient demesne was produced, which had been suffered a long time before, and the possession had gone accordingly. It appeared that part of the land was leased for life, and the recovery was by the person in reversion, so that there was no tenant to the *præcipe*. But the Court said, that as the possession had gone with the recovery for so long a time, they would presume a surrender; as in an appropriation of great antiquity, a licence has been presumed, although none appeared.

Gartside v. Radcliffe, 1 Cha. Ca. 292.

33. Where, after a recovery, the deeds were suppressed by the tenant for life, so that it could not be made out whether he had surrendered his estate for life to the tenant to the *præcipe* or not; it was decreed for the recovery, without allowing a trial at law; for where deeds are suppressed, *omnia præsumuntur*.

34. Where collateral evidence has been given of a surrender by a tenant for life, the recovery has been deemed good.

35. Upon a trial at bar, the lessor of the plaintiff claimed under an old entail in a family settlement, and part of the estate appeared to be in jointure to a widow, at the time her son suffered a common recovery. The defendant who claimed title under the recovery not being able to show a surrender of the mother's life estate, it was insisted that there was no tenant to the *præcipe*, as to that part; so that the remainder, which the lessor of the plaintiff claimed, was not barred. To obviate this objection, it was insisted by the defendant, that after so long a time had elapsed, a surrender should be presumed, according to the doctrine laid down in the case of Green v. Froud; and to fortify this presumption, they offered to produce in evidence the debt book of Mr. Edwards, an attorney at Bristol, then a long time dead; wherein he had charged 32*l.* for suffering the recovery, two articles of which charges were, for drawing a surrender of the mother's estate 20*s.* and for engrossing two parts thereof, 20*s.*; and that it appeared by the book that the bill had been paid. This being objected to as improper evidence, the Court were of opinion that it should be allowed; for it was a circumstance material upon the inquiry into the unreasonableness of presuming a surrender of the widow's life estate, and could not be suspected of having been done for this purpose. If Edwards had been living, he might undoubtedly have been examined; and after his death, this was the next best evidence, and it was accordingly read: after which the Court declared, *that without this circumstance they would have presumed a surrender, and desired it might be*

Warren ex dem. Webb v. Grenville, 2 Stra. 1129.

taken notice of, that they did not require any evidence to fortify the presumption after such a length of time.

36. But where there is no reason or ground to found a presumption, that the tenant for life had surrendered his life estate, and where the possession has not gone with the recovery, the Court will not presume that such a surrender was made.

Goodtitle ex dem. Bridges v. the Duke of Chandos, 2 Burr. 1056.

37. G. R. Bridges being tenant in tail of a considerable estate, whereof he was in possession of some part, the remainder being held by a widow, on whom it had been settled for life, for her jointure, and who was then in possession of it, suffered a common recovery of the whole estate tail, using such descriptions as were sufficient to include the whole estate tail, and then settled it on the Duke of Chandos. Upon the death of G. R. Bridges, the Duke of Chandos entered into possession of all the estate, except the part of which the widow was in possession, and upon her death he took possession of that part also. An ejectment was brought against the Duke of Chandos by James Bridges the reversioner, for that part of the estate tail whereof the widow was in possession at the time when the recovery was suffered; upon the ground that there was no surrender of the widow's life estate. The duke of Chandos being unable to give any sort of evidence of an *actual surrender*, his counsel insisted at the trial that a surrender of the widow's life estate ought to be *presumed* after so long a time, even though they should not give any evidence whatsoever of such a surrender: but Mr. Justice Noel, who tried the cause, was of opinion that a surrender of the tenant for life could not be presumed when no sort of evidence had been given to make such a fact in the least probable; and when the possession had not gone with the re-

covery, but had continued in the tenant for life until the time of bringing the ejectment; and accordingly he directed the jury to find for the plaintiff. Upon this direction a motion was made for a new trial. The defendant's counsel relied on the cases of Green v. Froud, and Warren ex dem. Webb v. Grenville, mentioned in the preceding pages. On the other side it was argued for the plaintiff, that there could be no presumption without some facts to ground it upon. In the case of Mr. Grenville, there was a very strong presumption arising from the articles in the attorney's bill; the proof whereof the Court allowed to be entered into, and received satisfaction from it: and that there was no case where a presumption of a surrender had been raised, without possession accompanying and following the recovery.

In the case of Froud v. Green, upon which Mr. Grenville's case was said to be grounded, there was a possession which had followed the recovery for a long time, and that was the very reason there given for the Court's forming the presumption which they then made. That the rule in all the cases cited, and in all cases of this kind, must in reason and common sense necessarily be understood to relate to the length of time which has elapsed *since the tenant in tail's coming into possession*, and not to the length of time since the suffering of the recovery. The outstanding life estate, during the life of the widow, forms the strongest presumption that she did not surrender the estate; besides, it did not at all appear from the Judge's report that G. R. Bridges, the tenant in tail in possession of all the *rest* of the estate, and of which he had power to suffer a recovery, ever meant or intended to suffer a recovery of these settled lands, which he had no power to do; he had

other lands upon which the recovery operated, and there was no reason to imagine that he meant to include these lands, or that he ever attempted to procure a surrender of them.

Lord Mansfield.—"I was counsel in the case of Mr. Grenville, reported by Strange, and I remember very well that the point of evidence was strongly litigated: the attorney, who had been concerned in the transaction of the common recovery, was one Edwards of Bristol, who had been then long dead: the entry in his bill book was made at the time of the transaction, and a receipt had been given upon the bill which contained the articles *for drawing and engrossing the surrender*; so that there was positive proof in that case of an actual surrender: and there the jointress had been dead *a vast number of years*; and the person who suffered the recovery, and his son after him, had both of them, during their respective lives, sufficient opportunity to have it set right after they came into possession, if they had known or suspected it to have been defective, which certainly formed a presumption that it was regular and not defective. I am confident that all the Court did, or intended to do, in that case, was only to take care that it should be understood that they did not mean to shake the authority of any one case which had been founded upon presumption, and that they would not require positive proof of a surrender, in any case where there was sufficient presumption of it. Sir J. Strange's report is incorrect, considered as a foundation for a principle or rule of property, though it might be enough to serve the taker of such a note for a memorandum to refresh his own recollection; if that be so, then consider the present case upon principles. There are two sorts of presumption, one a presumption of law, and not

to be contradicted; the other a species of evidence, which latter must have a ground to stand upon, something from whence it is to arise. It is now fully settled and established, that a tenant in tail may, if he pleases, either turn his estate tail into a fee simple, or alienate it for his own benefit, by suffering a common recovery; but he must have a sufficient estate and power to qualify him for suffering such a recovery; he must either be tenant in tail in possession, or he must have the concurrence of the freeholder, who claims under the same settlement. This principle is adhered to by the statute 14 Geo. II. c. 20. The tenant for life, whose consent is necessary to the tenant in tail in remainder, to enable him to cut off the entail, is not the lessee of the land under a beneficial lease, but the original tenant for life, claiming under the same family settlement, and having a life estate settled upon him prior, in order of succession, to the other's remainder in tail. Where a person has a power to suffer a recovery, and thereby bar his estate tail, *omnia præsumuntur rite & solemniter acta*, until the contrary appears; and it is reasonable that it should be so: but if the contrary appear, then there is an end of such presumption. This was the case of the Earl of Suffolk's recovery, upon a trial at bar in this court, in Easter term, 1747; there the contrary *did* appear, and the presumption was thereby destroyed; there were blundering deeds actually produced, which appeared clearly to be wrong; and it was manifest, upon the evidence disclosed, that there was not a good tenant to the *præcipe:* it was therefore impossible for the Court, in that case, to presume that there was a good tenant to the *præcipe*.

Keen ex dem. Earl of Portsmouth v. Earl of Effingham, 2 Stra. 1267.

" But if a man has power to suffer a recovery, that is a solid and reasonable ground for presuming that all was done rightly and regularly, unless something to the contrary shall appear. Where the freeholder is a trustee for the tenant in tail himself, and under his power and direction, it is a reasonable and just cause for presuming that every thing was regularly transacted; so where the person or persons interested to object against the validity of a recovery have had opportunity to make objections to it, but instead of doing so have acquiesced under it, and not disputed its validity, this forms a presumption that all was right and regular. But there can be no presumption in the nature of evidence in any case, without something from whence to make it, some ground to found the presumption upon; whereas here is absolutely nothing from whence to presume a surrender: the single pretence to any the least ground of presumption, in the present case, can only be this, that no tenant in tail in remainder would suffer a recovery, without first getting a surrender of the life estate, in order to make it valid and effectual. But even that ground, slight as it is, will not hold in the present case; for it does not at all appear, upon the report of the Judge, that G. R. Bridges, who suffered the recovery in question, had the least intention whatsoever to include those particular lands in the recovery which he suffered, and which he had full power in himself alone to suffer, of all the rest of the estate, whereof he was at that time tenant in tail in possession. He was then in possession of the manor of Keynsham, and of other lands in Keynsham, sufficient to answer the general descriptions used in the recovery. He must probably know, or have been in-

formed by his counsel or agents, that he had no such power over the settled parts, without obtaining a surrender of the life estate; he might perhaps be satisfied that he could not obtain a surrender of the life estate; or he might have attempted to obtain it, and failed in such attempt. If the mere fact of a remainder-man in tail's suffering a recovery was *alone* sufficient to ground a presumption of a surrender of the life estate, it would be in the power of every remainder-man in tail to bar the estate tail, notwithstanding the tenant for life should absolutely refuse to join with him in suffering a recovery; it is therefore necessary that there should be facts and circumstances to ground a presumption of such a surrender upon: whereas, in the present case, it is so far from being reasonable to presume that there was such a surrender from the jointress, that there are, on the contrary, many reasons to induce a suspicion that there was not such a surrender; she might have more regard for James Bridges than for George; she might think it wrong or unkind to hurt the reversioner; or even whim and peevishness might prevent her from interfering: there is no defining the various reasons she might have to hinder her from surrendering her life estate for such purpose. Mr. George Bridges being therefore only tenant in tail in remainder, and the life estate under the same settlement still subsisting at the time of his suffering the recovery, it is clear that he had no power to alien or to bar; and there is nothing from whence to presume a surrender of the life estate, to enable him to do so.

"If he had any power to bar or alien, then indeed no presumption could have been too large, in order to prevent slips in legal forms and methods of con-

veyance, and to effectuate the intention of a person who had a legal right to do such an act. No argument can be drawn in the present case from length of time, because the ejectment was brought immediately upon the death of the jointress." The Court were all clear and unanimous, that there was no colour for objecting to the Judge's direction.

At the sitting of the Court the next morning, Lord Mansfield mentioned this case again: He said he had looked into his own note of the case of Warren on the demise of Webb against Grenville, where the recovery was of forty years standing; and the Court did lay it down in that case, "that, after a recovery of forty years standing, they would, without any other circumstances, presume a conditional surrender to have been made by the tenant for life;" and they relied upon 1 Ventr. 257, and Mr. Pigot's book, p. 41. But his Lordship observed, that there are other circumstances, in the case in Ventris; and there is nothing in Pigot to justify this general position. And he added, that in the case then at the bar, the Court did (as he had taken it down) admit as evidence the entry in the attorney's book, as has been mentioned. He said, he was rather more strongly of opinion than he was yesterday, "that in the present case there was no ground for a presumption that there was any surrender by the tenant for life." Here were two particular reasons against making any such presumption. One was, that there did not appear to have been any intention in the remainder-man in tail to suffer a recovery of these particular lands: the other, that here was no possession at all, under this recovery; but, on the contrary, the ejectment was brought, and the validity of the recovery put into litigation, immediately after the death of the tenant

for life. If the eldest son, who has a remainder in tail under a family settlement, should privately suffer a common recovery, and his father live many years afterwards, it might as well be argued, "that length of time from the date of the recovery should induce a presumption that the father surrendered his estate for life." And his Lordship declared himself as clear, that if there had been a long possession by the tenant in tail after the death of the tenant for life, though such a possession might be ascribed to the entail, the presumption ought to have been made, upon the ground of acquiescence under it, and the probability arising therefrom, "that the parties knew that the recovery was not defective." Rules of property ought (his Lordship said) to be generally known, and not to be left to loose notes, which rather serve to confound principles, than to confirm them. He therefore proposed to have a conference with all the Judges upon this case: which proposal did not arise, he said, from any doubt about the matter (for he was more confirmed in his opinion than he was yesterday), but for the sake of having so considerable a rule of property settled, and of rendering it notorious and public. For which purpose, he (at first) ordered it to stand over till next term: but afterwards, upon its being agreed by all the parties, that, in Mr. Grenville's case, there was a great number of years during which the tenant in tail had been in possession after the death of the tenant for life; and upon the now defendant's counsel candidly declaring "that they themselves were fully satisfied with the present opinion of the Court," he retracted his proposal, and said he would not trouble the Judges with it, since the counsel were so candid as to acquiesce entirely in the opinion that the Court had already intimated.

His Lordship further added, that he would have it understood, that possession of the tenant in tail, after the death of the tenant for life, does leave a ground of presumption "that there was a surrender." But, in the present case, there was no possession after the death of the tenant for life: the ejectment was brought immediately.

How a Tenant to the Præcipe may be made.

38. When the person who means to suffer a common recovery is in actual possession of the freehold, he may convey it to any stranger, for the purpose of making him tenant to the *præcipe*, by fine, by feoffment, grant, bargain and sale enrolled, or lease and release.

By Fine.

39. It is sometimes thought expedient to make a tenant to the *præcipe* by fine; not only on account of the notoriety of this species of assurance, but because even an erroneous fine gives such an estate to the cognizee as is sufficient to make him a good tenant to the *præcipe*. And Lord Hale has said, that

3 Keb. 597.

the cognizee of a fine Oct. Purif. would be a good tenant to the *præcipe*, in a recovery suffered the same day; and the Court would presume a priority to support a conveyance.

Lloyd v. Evelyn, 2 Salk. 568.

40. A writ of error was brought against a person who was made cognizee of a fine, in order to make him tenant to the *præcipe*; and after the recovery had been suffered, the fine was reversed for error; yet the recovery was held good; because there was a sufficient tenant to the *præcipe* at the time.

41. But if the fine was in itself absolutely void; as if the person who levied it had no estate of freehold in possession of the land; there the recovery would be void, because in that case the fine passed no estate.

42. Thus in the case of Dormer v. Parkhurst, where a fine was levied by a tenant for years and a remainder-man in tail, to make a tenant to the *præcipe;* it was determined that the recovery was void, because none of the parties to the fine had an estate of freehold in possession in the lands. ante, § 21.

43. In a celebrated case which arose in Ireland, and which will be stated in a subsequent chapter, it was held by the House of Lords there; contrary however to the opinion of a majority of the Judges, and of the Lord Chancellor; that where a fine was levied by the Earl of Ely for the purpose of making a tenant to the *præcipe,* and a recovery was suffered thereon in the same term, the fine should be deemed conclusive evidence of the sanity of the cognizor, and of his capacity to suffer the recovery; the fine and recovery being considered as one assurance. Hume v. Burton, infra, c. 11.

44. It has been already stated, that where a fine is levied without any consideration or declaration of use, the use and legal estate immediately result to the cognizor of the fine, so that the cognizee has only a seisin of an instant. In consequence of this doctrine, where a fine was levied in order to make a tenant to the *præcipe,* and a writ of entry was brought against the cognizee of the fine, on which a common recovery was suffered, it was doubted whether such a recovery was good; for as no use was declared on the fine, it was said that the use and estate immediately resulted back to the cognizor; so that the cognizee had no estate of freehold when the writ of entry was brought, nor ever afterwards. Mr. Pigot held, however, that such a recovery would be good; for at common law, if a fine was levied without consideration, as in a fine there needs none, the cognizee was tenant to all writs, until the statute of pernors of profits, Though no Use be declared. Tit. 11. c. 4. § 20. 3 Keb. 113. Pigot, 52. Id. 54.

and the statute of uses: and although, since the statute of uses, the use results back when no use is declared, yet the intent of the parties always guided the use, and there could be no resulting use against the express intent of the parties; so that whenever the use results, it is because the parties intend it. Now, in a case of this kind, the evident intention of the parties is to make a tenant to the *præcipe*, which appears upon the record, by the writ of entry being brought against the cognizee; and therefore he must have such an estate as will make him a good tenant to the *præcipe*.

These principles have been fully established in the following cases.

Altham v. Anglesey, Gilb. R. 16. 1 Salk. 676. Holt. 733. 11 Mod. 210.

45. A tenant in tail levied a fine to J. S. and his heirs, in order to make him tenant to the *præcipe* in a common recovery, but no use was declared on the fine. Seven years after, a writ of entry was brought against J. S., who vouched the cognizor of the fine, and a common recovery was thus suffered. The question was, whether J. S. had an estate of freehold in him at the time of the recovery.

It was contended, that although the legal estate passed by the fine to J. S., yet as no use was declared, it immediately resulted back to the original owner of the estate; so that J. S. had no estate in the lands when the recovery was suffered, and therefore was not a good tenant to the *præcipe*. But it was held by Lord Holt and all the other Judges, that when a fine was levied, or a feoffment made to a man and his heirs, the estate was in the cognizee or feoffee, not as an use, but by the common law, and might be averred to be so. And as in this case the intention of the fine plainly appeared to be for the purpose of making a tenant to the *præcipe*, the use and estate

should be allowed to have vested in J. S. and not to have resulted to the cognisor of the fine.

46. In a subsequent case, Lord Ch. Just. Parker said, that a fine being levied, and no use declared, and a recovery having been immediately after suffered of the same lands; the writ of entry being brought against the cognizee of the fine, showed that the intent of levying the fine was, to make a tenant to the *præcipe*. Thrustout v. Peake, 1 Stra. 12.

47. It has been often doubted, whether a husband, seised *jure uxoris*, could make a tenant to the *præcipe* of his wife's land, without her joining him in a fine. This doubt probably arose from the words of Lord Talbot, in the case of Robinson v. Cummins, as reported by Mr. Forrester; for there his Lordship is said to have expressed himself thus:—"It hath been said, that a feme tenant in tail, and her husband, cannot make a tenant to the *præcipe* without a fine; but whatever may be the case where a husband is merely seised in right of his wife, is not necessary for me to determine; because in this case Sir J. Robinson did, by his intermarriage, become entitled to an estate by the curtesy; and therefore he alone, without his wife's joining, might have made a good tenant to the *præcipe*." A Husband seised Jure Uxoris may alone make a Tenant to the Præcipe without Fine. Pa. 167.

48. In an opinion given by the late by Mr. Booth on this subject, he observes, that this report of Lord Talbot's argument is incorrect; that he himself was present at the hearing of that case, and had a very full note of it; and that Lord Talbot's words were these:—"If I should lay it down as a rule, that where the wife is entitled to an estate tail in possession, her husband and she could not make a tenant to the *præcipe*, for the docking of the entail, without a fine, because the law is supposed to appoint no other Cases and Opinions, vol. 1. 436. vol. 2. 132.

method by which a woman under coverture can convey her freehold, but by fine, I should shake many of the common recoveries of the kingdom; for whatever may have been the practice of some overcautious conveyancers, yet I believe it hath often been held that the husband alone may, by deed only, and without any fine levied by the wife, convey a sufficient freehold to the grantee to make him tenant to the *præcipe*."

49. This latter opinion seems to be perfectly consistent with the principles of the common law; for
1 Inst. 351 *a*. 273 *b*. Lord Coke says—"If a man taketh to wife a woman who is seised in fee, he gaineth by the intermarriage an estate of freehold in her right; which estate is sufficient to work a remitter."—It must be the same
1 Roll. Ab. 845. Gilb. Ten. 108. where a man marries a woman seised in tail; for a feme covert cannot have a seisin distinct from her husband. And on this ground it has been frequently determined, that the husband's conveyance is sufficient to transfer a good estate of freehold, during the
Pa. 72. joint lives of the husband and wife. Mr. Pigot was of the same opinion, having laid it down, that a husband seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, might create an estate of freehold during the coverture, and thereby make a good tenant to the *præcipe*. And this point was expressly determined in the following case, stated by Serjeant Roll.

Roll. Ab. tit. Recov. A. pl. 4. 50. A husband seised in right of his wife for life, remainder in tail to B., remainder to C., bargained and sold the land to another, against whom a *præcipe* was brought, who vouched him in remainder; and so a common recovery was suffered. Adjudged, that the recovery barred the remainder, because the bargainee was a good tenant to the *præcipe*.

Feoffment.

51. It has been a frequent practice, ever since the introduction of common recoveries, to make a feoffment, with livery of seisin, of the lands, to the person against whom the writ of entry was intended to be brought, it being a common opinion, that a feoffment was the most secure conveyance by which a tenant to the *præcipe* could be made; because if the feoffor was in possession at the time when the livery of seisin was made, the feoffment was supposed to pass a good estate of freehold, either by right or by wrong, that is, by disseisin; but this doctrine has in some respects been denied in the following case.

Vide Tit. 32. c. 4. § 33.

Taylor ex dem. Atkyns v. Horde, 1 Burr. 60. 6 BrownPar Cas. 633.

52. In an ejectment for lands in Gloucestershire, the jury found a special verdict, that Sir Robert Atkyns, senior, being tenant for life, with remainder to his first and other sons, reversion in fee to himself, with a power of appointing a jointure to any after-taken wife, married Ann Dacres, and, pursuant to his power, limited the lands in question to the said Ann Dacres for her life as a jointure. Sir Robert Atkyns, senior, made his will duly attested, and devised his reversion in fee, expectant on the estate tail limited to his first and other sons, to Mr. Atkyns, the lessor of the plaintiff. Sir Robert Atkyns, senior, died, leaving a son, Sir Robert Atkyns, junior, who entered on all the estate, except that part which was limited to Lady Atkyns for her jointure, on which she entered. Lady Atkyns being in possession of these lands, an ejectment was brought against her in the Common Pleas by John Philips, on the several demises of Sir Robert Atkyns, junior, and Joseph Walker, for the recovery of the premises in question, on the ground, that Sir Robert Atkyns, senior, had no power of appointing her a jointure; and the same was tried at the bar of the Court of Common Pleas,

when a verdict was found for the plaintiff, on which judgment was entered, and a writ of *habere facias possessionem* was sued out and executed; and Sir Robert Atkyns, junior, entered into, and was in possession of the premises. Sir Robert Atkyns, junior, being thus in possession during the lifetime of Lady Atkyns, made a feoffment of the premises, with livery of seisin, to James Earle, in order to make him tenant to the *præcipe*, for the purpose of suffering a common recovery, which it was thereby declared should enure to the use of Sir Robert Atkyns, junior, his heirs and assigns for ever. A common recovery was accordingly suffered, in which the writ of entry was brought against James Earle, the feoffee, who vouched Sir Robert Atkyns, junior, and his wife, and they vouched over the common vouchee. Sir Robert Atkyns, junior, continued in possession, from the time of the recovery until November 1711, when he died without issue. Lady Atkyns, the jointress, brought an ejectment against Robert Atkyns, the heir at law of Sir Robert Atkyns, junior, for the recovery of her jointure; the cause having been tried at the bar of the Court of Common Pleas, and it appearing evidently to the Court, that Sir Robert Atkyns, senior, had a power of appointing a jointure to Lady Atkyns, which he had duly executed, and that the former verdict was clearly wrong, a general verdict was given for the plaintiff, on which judgment was entered, and Lady Atkyns was restored to the possession of the premises, and continued seised of them until the time of her death. The principal question in this case was, whether the recovery was well suffered? which entirely depended upon, whether James Earle, the feoffee of Sir Robert Atkyns, was a good tenant to the *præcipe*.

It was contended, on the part of the plaintiff, that the recovery was not well suffered; and, to show that James Earle took no estate by the feoffment, which could make him a sufficient tenant to the freehold, to answer the writ in a common recovery, it would be material to consider, first, whether Sir Robert Atkyns, junior, was tenant in tail in possession; and, secondly, supposing him to be only tenant in tail in remainder, whether his feoffment conveyed the freehold to James Earle by disseisin? As to the first of these questions, if Sir Robert Atkyns had been tenant in tail in possession, his bargain and sale, his lease and release, his fine, or his feoffment, would have conveyed a base fee; and operating by way of discontinuance, voidable either by the entry or action of the issue in tail, or remainder-man, would have made, by discontinuance, a sufficient tenant of the freehold; but Lady Atkyns, the jointress, was seised of the freehold for life, at the time of making the feoffment, and never joined in conveying an estate to the feoffee; the feoffment, therefore, being only the act of the tenant in tail in remainder, must either pass an estate by disseisin, or was absolutely void. Then, whether the feoffment conveyed the freehold to John Earle, so as to make him a good tenant to the *præcipe* by disseisin, depended, first, on Sir R. A's entry; secondly, on his feoffment. By his entry, he gained no freehold; by his feoffment, he conveyed no estate; for, as to his entry, it was made under a mistaken judgment in ejectment, for Lady Atkyns, the jointress, recovered possession again in ejectment; by which second judgment his title was disaffirmed; and as the first judgment was plainly wrong, his entry must be considered as the mere act of tenant in tail in remainder. By the judgment in ejectment, he could recover nothing but the term;

the point of that action is, that the plaintiff may gain possession under his term. The possession of the lessee being that of the lessor, the way in which it always operates to the lessor's benefit, is, that by obtaining judgment for the possession of his supposed tenant, he is enabled to enter; and, having entered, the possession unites with any present freehold in himself, whether it be a particular estate, or an estate in fee according to his right. But, in this case, Sir Robert Atkyns had no present estate of freehold in himself, he gained only a bare possession, and the freehold still remained, in judgment of law, in the jointress, who had the right to it: the entry of Sir Robert Atkyns under the judgment, must be a lawful entry; whether the sheriff executes the writ and gives possession, or whether the party is his own officer, and executes it for himself by taking possession, it has been held, that the entry is equally lawful in either method, if it pursues the judgment. But his possession being recovered without title, no holding over could gain the freehold; and his entry being lawful, no holding over, though wrongful, could create a disseisin, or change the cause of his possession; so that his conveyances were absolutely void, he having no estate on which a release would operate by way of enlargement, and there being no privity between him and the owner of the freehold. As to the feoffment of Sir Robert Atkyns, it might be considered in two lights. First, as a conveyance, operating either by right or by wrong. Secondly, as a conveyance, executed with a particular intent of making a tenant to the *præcipe* in a common recovery. 1st. As a conveyance, generally, it was not pretended that it could operate by right; it could only then be construed to convey a freehold by wrong. But it was a necessary

consequence of the reasoning upon Sir Robert Atkyns's entry, that his feoffment was absolutely void; for, where the true owner of the freehold is actually expelled by the tortious entry of the disseisor taking violent possession of the land, that disseisor has gained an estate of freehold and fee, which will pass by a bare livery on his feoffment; his force gained him an estate by wrong, and his feoffment will convey it. But, in this case, the entry and the possession being lawful so long as the judgment was in force, the only wrongful act from which a disseisin could be inferred, was the feoffment. The giving livery upon that feoffment, not followed by any possession of the feoffee, could never make a disseisin in the strict, original, and legal sense; it would be a disseisin merely at the election of the rightful owner of the freehold, and for the sake of his remedy. It was the act of his tenant for years, and the wrongful feoffee was put into possession; the true owner might either accept his rent, and treat him as an under-tenant and assignee of the term, or he might maintain an assize and recover the freehold. If the wrongful feoffor continued in possession by collusion with his feoffee, as in the present case, the true owner was under no necessity to take notice of the feoffment; he was not bound to consider his own tenant as a disseisor, and himself as out of possession, but still had it in his election, either to accept his rent, distrain and bring an action for it, or to proceed in a real action for recovery of the freehold, as in case of a forfeiture. Thus, the feoffment of tenant for years, or tenant by sufferance, would make a disseisin for the benefit of his lessor, in respect of that remedy which the lessor might elect to take; but estates in remainder could not be displaced without a tortious entry; and, as to such remainders, the feoff-

ment was absolutely void in law. 2d. As a conveyance, executed with the particular intent to make a tenant to the *præcipe* in a common recovery, it had never yet been determined, that the feoffment of a tenant for years, being also tenant in tail in remainder, perfected by livery upon the land, under colour of lawful possession *eo animo*, to make a tenant of the freehold in a common recovery, would be sufficient to support the judgment in that recovery, and enable him to bar his own and the subsequent estates; if so, then a tenant in tail in remainder might suffer a recovery in every instance, as freely as a tenant in tail in possession, not only without the concurrence of the immediate owner of the freehold, by his joining in it as an essential party, or surrendering his estates, but even without asking his consent, or giving him any notice. By collusion with the tenant for years, by secret practices, to take advantages of a vacant possession, when the tenant of the freehold was absent from his house or land, he might execute a feoffment, and then suffer a common recovery, to anticipate that right which the law has wisely and justly postponed, till he should chance to succeed in the order of the entail. If this method of suffering recoveries were once established as legal, the eldest sons of the first families in England, who are tenants in tail in remainder, expectant on the estate for life of the father, might dispose of the inheritance of their estates at the age of twenty-one, against the consent and in spite of the authority or the freehold of their parents. Conveyances to make a tenant to the *præcipe* in a common recovery, are considered as mere instruments to make parties in a fictitious action, to serve the purpose of him who means to suffer the recovery. Such a feoffee, as in the present case, was

often called a mere *actor fabulæ*. If he was tenant for years of the lands conveyed by the feoffment before the making of it, his term would not merge in the fee-simple; no dower could arise out of it; his judgments or statutes would not bind it. This being the uniform tenor of determinations in courts of law, in which the intent of the conveyance has been considered, and not the mere legal operation of it, it followed, that the validity of the estate must depend on the right and power of him who made it to suffer a recovery. If the feoffor had no such right or power, his feoffment was void; and the estate conveyed, being founded in fraud, was as no estate, in judgment of law. The common law avowed these principles, and the Legislature had adopted them; for the statute 14 Geo. II. c. 20., which was made to support common recoveries against nice exceptions, and to raise presumptions in favour of them after a limited time, most anxiously provides, that the persons joining in such recoveries should have sufficient estate and power to suffer the same; as if the Legislature had foreseen the present case, and were aware and afraid that tenants in tail in remainder might, by colour of that law, in future times suffer common recoveries, without the concurrence of the true immediate owner of the freehold.

On the other side, it was argued, that this recovery was valid, and that James Earle was actually tenant of the freehold when judgment was given. First, because when Sir Robert Atkyns entered, in consequence of the judgment which he obtained against Lady Atkyns, the jointress, he became tenant in tail in possession. Secondly, because even if he were only tenant for years, his feoffment would convey an estate of freehold. In support of the first of these positions, it was argued,

that a judgment is an act of law, and, whilst it continues in force, destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party, but gives a right of possession to the recoveror. If the judgment in ejectment did not produce this effect, the lessor of the plaintiff could not enter, or be entitled to the writ of *habere facias possessionem;* but his having a right to enter and sue out that writ, infers his right to the possession. Whilst the judgment stands in force, it removes an intervening estate out of the way, and, during that time, it is the same thing as if it had never existed, and the recoveror's right to the possession will continue until judgment is reversed by error, or falsified in another action. In consequence of these principles, it followed, that the right to the possession and the remainder in tail meeting in the same person, and that person being Sir Robert Atkyns, the possession and the remainder in tail united, and Sir Robert Atkyns became seised of an estate tail executed, or, in other words, of an estate tail in possession. If the nature of an action of ejectment, and the consequence resulting from a recovery in it, were considered, it would appear in a clearer light. An ejectment is a possessory action, in which almost all titles to land are tried; whether the party's title is to an estate in fee, tail, for life, or for years, the remedy is by one and the same action. In an action of ejectment, the plaintiff recovers only the possession of the land, and the execution is of the possession only; but if the lessor of the plaintiff recovers only the possession of the land, it may be asked, how he becomes seised according to his title? To which it may be answered, that when a person is in possession by title, as every person is who enters

in execution of a judgment in ejectment, because the law does no wrong, the possession and title unite; for it is a rule of law, that when a man, having a title to an estate, comes to the possession of it by lawful means, he shall be in possession according to his title. As where the title is to have a fee, he becomes seised in fee; where the title is to have an estate tail, he becomes seised of an estate tail, and so on; the law casting the estate upon him according to his title: and, were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates, and would never answer the purpose for which it was brought into use, if the lessor of the plaintiff acquired no more than a bare possession after an execution or entry on a judgment in ejectment. In support of the second position, it was said, that a feoffment operated on the possession, without any regard to the estate or interest of the feoffor. A grant operated on the estate or interest which the grantor had in the thing granted. To make a feoffment good and valid, nothing was requisite but possession; and where the feoffor had the possession, although it was but a bare and naked one, yet a freehold or fee-simple passed by reason of the livery. It was no plea in avoidance of a feoffment, that the feoffor had nothing in the land at the time of the feoffment, because the land passed by the livery; if the operation of the feoffment was questioned, the only plea was, *ne enfeoffa pas*, which put in issue only the livery. Lord Chief Justice Holt laid it down as clear law, in the case of Hunt v. Burne, that if a lessee for years makes a feoffment with livery, though the lessor be on the land protesting against it, yet the land passes, because the lessee was entitled to the possession. And this opinion was supported by the determination in

Lit. § 611. 698.
1 Inst. 366 *b.*
Year-Book, 10 Ed. 4. 8, 9.

Cro. El. 321. the case of Read and Morpeth v. Errington, where the question was, if a feoffment by a lessee for years, the lessor being upon the land, was a good feoffment? for it was pretended, that his being upon the land guarded it so that no feoffment could be made; but the Court was of opinion, that the feoffment was good, because the lessee had the sole right to the possession, and livery ought always to be given of the possession. Before the statute of uses, a *cestui que use* conveyed the use by bargain and sale, and afterwards levied a fine to a stranger. And the question was, whether the fine was not void, as neither of the parties had any thing in the land? for, by the bargain and sale, the use was in the bargainee, and nothing was in the bargainor or in the stranger. It was argued, that if this fine was not good, great inconveniences would follow, for that many recoveries had been suffered against the bargainor after he had conveyed the use: to which Fitzherbert replied, "It is the folly of purchasers that they do not take a feoffment from the *cestui que use* before the fine is levied; for if they do, the fine will be good. I, for my part, (says he) will never purchase any land without taking a feoffment, so that I may be in possession when the fine is levied; for then the fine will undoubtedly be good." The possession here spoken of must be a freehold at least, because nothing less than a freehold will support a fine; for if neither the cognizor nor cognizee had an estate of freehold in possession, remainder, or reversion, at the time of levying the fine, it would be void. The feoffment here spoken of is the feoffment of a *cestui que use* after he had parted with the use, and whilst the freehold and inheritance of the estate was in the feoffees, so that it was the feoffment of a person who had only a bare and

Year Book, 27 Hen. 8. 20.

naked possession (unaccompanied with right) to a stranger. This was the opinion, and this was the practice, of one of the greatest lawyers of the age. The observations upon the opinion of Fitzherbert are, that if a feoffment from the *cestui que use* to a stranger, after he had conveyed the use, would have made the fine undoubtedly good, the like feoffment would have made a good tenant to the *præcipe;* and for this plain reason, because the feoffment passed a freehold. There is a case in Dyer, 340, where the feoffment of a person in remainder, in the absence of the tenant for life, was determined to be a good feoffment. The case was, a remainder-man in fee enfeoffed a stranger, in the absence of a tenant for life, who neither attorned nor assented to the feoffment, but occupied the estate during his life; and it was held to be a good feoffment for the fee-simple. And in the case before the Court, the feoffment was made by Sir Robert Atkyns the remainder-man, in the absence of the tenant for life, who neither attorned nor assented, and who occupied the estate during her life. A distinction was made between rightful and wrongful conveyances. A fine, release, or bargain and sale, are called rightful conveyances, and a feoffment a wrongful one; but no such distinction exists, for all conveyances are in themselves equally rightful, and are to be made use of according to the nature of the case to which they are applicable; that a freehold would not pass by a fine, release, or bargain and sale, from a person who had only a bare and naked possession, did not proceed from these conveyances being lawful ones, but from the nature of them, whose property it was to convey nothing but what the maker of them might lawfully convey, because they operated as a grant; therefore, to infer from thence, that a

freehold would not pass by a feoffment, which was a conveyance of a different operation, and whose property was to pass a freehold and fee by force of the livery, was an inconclusive argument: every one who can get into possession has, and ever had, a power to make a feoffment, for the law makes no distinction of persons; and, whenever a tenant in tail in remainder had obtained the possession, whether by right or by wrong, and had done an act whilst in possession to make a tenant to the *præcipe*, in order to suffer a common recovery, no instance could be produced where such an act had been adjudged fraudulent, unfair, or irregular. The principal argument, opposed to the doctrine here laid down, might be reduced to the head of inconvenience. But the question was not, what inconvenience would attend the determination either way, but what was the law. The inconvenience, if there were one, arose from the nature and operation of a feoffment, and could not be avoided but by taking away that conveyance, or depriving it of an operation which it had been allowed to have by all the sages of the law. But, to do that, was not in the power of a court of justice; since no maxim of the common law could be abrogated or abolished, but by a legislative authority. It was once thought to be a great inconvenience, that a descent, immediately after a disseisin, should take away the entry of the person disseised; at another time, it was thought to be no small one, that the son should lose his patrimony because he happened to be born out of time; and, until lately, an heir might have been deprived of his family estate by the warranty of an ancestor, who was never in possession of it. These inconveniences were as great as that which was pretended to arise from the feoffment of a tenant in tail in remain-

der, expectant on an estate for life, and yet they continued through ages, till the legislature took them away. When the law was doubtful, it might be allowable to draw an argument from inconvenience; but where the law was clear and precise, as it was, that the feoffment of a person in possession, let him come to the possession how he would, passed a fee, an argument from inconvenience was not admissible, because it tended to undermine and overthrow the law.

Lord Mansfield delivered the resolution of the Court, of which I shall present the reader with an abstract, as far as it relates to the validity of the recovery. "As Lady Atkyns had an estate for life in the premises, and did not join by surrender or otherwise, in any conveyance of the freehold to James Earle, the tenant to the *præcipe*, the great question is, whether James Earle had acquired the freehold by disseisin? The better to judge of this question, it will be proper to attempt finding out what the old law meant by a disseisin, which constituted the tenant of the freehold, in respect of every demandant suing out a *præcipe*, although the owner's entry was not taken away; for, where the right of possession was acquired, and the owner put to his real action, there, without doubt, the possessor had got the freehold, though by wrong. Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted, or pass. *Sciendum est feudum sine investitura nullo modo constitui posse.* Disseisin must, therefore, mean, some way or other of turning the tenant out of his tenure, and usurping his place and feudal relation. Formerly, no tenant could alien without licence from the lord;

Feud. lib. I. tit. 25.

when the lord consented, the only form of conveyance was by feoffment, publicly made *coram paribus*, with the lord's concurrence. Homage or fealty was solemnly sworn, and suit of court and services were frequently done. The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers. The freehold never could be in abeyance, because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his *præcipe*. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*. The statute of *quia emptores terrarum*, and other statutes which extended the power of alienation to the King's tenants *in capite*, the frequent releases of feudal services, the statutes of uses and wills, and, at last, the total abolition of all military tenures, have left little more than the names of feoffment, seisin, tenure, and freeholder, without any precise knowledge of the things originally signified by these sounds. The idea which modern times annex to freehold or freeholder, is taken merely from the duration of the estate. Copyholds, and the customary freeholds in the north, retain some faint traces of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that, usurping such copyhold or customary tenure, is a different fact from a naked possession or occupation of the land; but whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisins, upon every

change of a tenant by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that, formerly, it was as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation. Disseisin is a complicated fact, and differs from dispossessing. The freeholder by disseisin differs from a possessor by wrong. Bracton puts many cases of possession wrongfully taken, which he calls intrusion, because there was no disseisin, *possessio quæ nuda est omnino, et sine aliquo vestimento, quæ dicitur intrusio.* A particular tenant, according to the feudal notions, was in as of the seisin of the fee, of which his estate was a part; if he aliened the fee, which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held, he forfeited his particular estate, for having betrayed his seisin with which he was intrusted. But, on account of the privity and confidence between him and the revesioner, and the notorious solemnity of the act of investiture, his feoffment disseised the reversioner. Bracton mentions the disseisin in this case, as a necessary consequence, and as a thing which could not possibly be otherwise;—*item facit quis disseisinam cum quis in seisina fuerit ut de libero tenemento et ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo, alium feoffaverit in prejudicium veri domini, et fecerit alteri liberum tenementum; cum duo simul et semel de eodem tenemento et in solidum esse non possunt in seisina.* He considered it as impossible for the true tenant not to be put out, when the other actually came into his place. So late as the 32 Eliz. in the case of Matheson v. Trot, 1 Leon. 209, the distinction upon which the judgment turned, was, "that Henry Denny gained a wrongful possession in fee, but did

not gain any seisin, so no disseisor; therefore the descent to his heir was not privileged." The precise definition of what constituted a disseisin, which made the disseisor tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded; for, after the assize of *novel disseisin* was introduced, the Legislature, by many acts of parliament, and the courts of law by liberal constructions, in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property, if, by bringing his assize, he thought fit to admit himself disseised. The law books treat of disseisin with a view to the assize, which was the common method of trying titles till ejectment came into use. Littleton, who wrote long after the remedy by assize was enlarged by statutes, and, by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize. These are the common places from whence many descriptions have been cited of a disseisin; but such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant, and freeholder *de facto* in spite of the true owner. Though the term *disseisin* happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin, or disseisin by election, is very different. This distinction of disseisin at election is made in the case of Blundel v. Baugh, Cro. Car. 302. In a manuscript report of this case, much fuller than the printed one, the three Judges, with whom agreed

the four Judges of the Common Pleas, argued and held, "that the lessee for years of the tenant at will was a disseisor, at the election of the original lessor, for the sake of his remedy, but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons." And the manuscript note says, if a *præcipe* was brought against him, he might say, "I am not tenant to the freehold." If a lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will consider himself as disseised, or not. Metcalfe *ex dem.* Parry and others, which was a case reserved at Salop assizes, 25th March 1743, for the opinion of the Court of Exchequer, who gave judgment on the 24th of November 1743, was thus: Tenant in tail of lands leased by his father to a second son for lives (under a power), upon his father's death received the rent from the occupier, as owner; and, as if no such lease had been made, he suffered a common recovery: it was held, that this was only a disseisin of the freehold at election, and that therefore he could not make a good tenant to the *præcipe*, and the recovery was adjudged bad. I will now consider, whether James Earle can be deemed a good tenant of the freehold by disseisin. Disseisin is a fact, it is not found; all the jury say is, that soon after the judgment in ejectment, Sir Robert Atkyns entered, and was in possession. This must be taken to be an entry in consequence of the judgment; it was so considered on settling the special verdict, otherwise the defendants have no case; for it is not found that Lady Atkyns was ever ousted, or quitted the possession, or that

Sir Robert was ever seised. Taking possession under a judgment in ejectment, never could be a disseisin of the freehold. Suppose it a real proceeding, the termor of a disseisee might, by the old law, recover against the disseisor; he might recover against the feoffee of his lessor; but he could never thereby become a disseisor of the freehold; he never could be other than a termor, enjoying in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had enfeoffed, it enured to the alienee: if the lessor was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who, in that case, had the right of possession. Suppose the proceeding (as it is) a fictitious remedy, then in truth and substance a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed according to right, *prout lex postulat.* If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. It is found that the ejectment was brought by Sir Robert Atkyns to recover the possession, but it is not found that he claimed the freehold. The title must now be taken as in the special verdict, therefore it appears that he had no right to the possession. His feoffee could be in no other condition than himself; he had a possession without prejudice to the right, and could convey no other. He was not in as a particular tenant; there was no privity of

any seisin; he had only a naked possession. But the case is still stronger; the true owner cannot even elect to make a person in possession, under a judgment in ejectment, a disseisor. He could not bring an assize of *novel disseisin;* the entry is not *injustè et sine judicio*, but under the authority of a court of justice, and therefore lawful. There is still behind, though it happens not to be necessary, a larger ground upon which to determine this question, and more satisfactory, because more intelligible, from the nature of a common recovery now, and a feoffment to make a tenant to the *præcipe* with that view only. The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it. Nothing could be more agreeable to the law of tenures than a male fee unalienable; but this bent to set property free, allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture. No sooner had the statute *de donis* repeated what the law of tenures said before, that the tenor of the grant should be observed, than the same bent permitted a tenant in tail of the freehold and inheritance to make an alienation voidable only under the name of a discontinuance; but this was a small relief. At last, the people having groaned for two hundred years under the inconveniences of so much property being unalienable, and the great men, to raise the pride of their families, and, in those turbulent times, to preserve their estates from forfeiture, preventing any alteration by the Legislature, the same bent threw out a fiction in Taltarum's case, by which tenant in tail of the freehold and inheritance, or with the consent of the freeholder, might alien absolutely.

Public utility adopted and gave a sanction to the doctrine, for the real political reason, to break entails; but the ostensible reason, from the fictitious recompence, hampered succeeding times how to distinguish cases which were within the false reasoning given, but not within the real policy of the invention, till at last the Legislature applauded common recoveries by a variety of statutes As the Legislature has for ages avowed the proposition, we may now say, that common recoveries are a mere form of conveyance, all necessary circumstances of form and ceremony are taken from its fictitious original. The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property; alienations were allowed, yet in such a shape as necessarily required deliberation and delay; and they were only allowed to be made by tenant in tail in possession, or by tenant in tail in remainder, with the consent of the owner of the first estate for life; the eldest son was restrained in the lifetime of his father or mother, or any other ancestor or relation seised for life under a family settlement. The act of 14 Geo. II. proceeds upon the parties to a recovery having power to suffer it: Sir Robert Atkyns the son had no right to suffer a common recovery, without the concurrence of the jointress; any contrivance therefore to do it, without her joining, is artifice and evasion. If tenant in tail in possession is disseised, though the *præcipe* be brought against the disseisor, yet if he is vouched, the recovery shall bar, because he had power to bar. In Jennings's case, 10 Co. 44, the recovery is supported, because the parties had power to bar; by parity of reason, this recovery ought not to be supported, because the parties had no power; if it was, the law must be

overturned. Every remainder-man in tail might easily get a naked possession, and make a secret feoffment. The plan of marriage and other family settlements, is to limit a remainder to the first and every other son in tail; the negative which the father now has upon the eldest son's suffering a common recovery, is the very means and consideration of getting the estate re-settled upon the marriage of the eldest son. By this method, the moment he attains to the age of 21 years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. This consequence alone, in a case unprecedented, is a sufficient objection. If, before the introduction of common recoveries as a conveyance, this question had been agitated in an adversary real action, upon a plea that Earle was not tenant to the freehold, it would have been adjudged, from the law, and artificial learning of tenures, that he could not be so considered. If the question had been, whether tenant in tail in remainder should, by such an injurious entry and feoffment, acquire a benefit to himself, to the prejudice of his reversioner, it would have been adjudged, from eternal principles of justice, that an act founded in wrong should not, by virtue of the crime itself, become legal for the author's advantage. As it is now agitated, when common recoveries are established as a species of alienation, the only question is, whether the rule of law, which requires the concurrence of the owner of the first estate for life, shall be overturned? It is better to subvert the rule directly, than suffer it to be done by a secret injurious entry and feoffment, which cannot be prevented, and which the owner may never hear of. There is no injury or wrong for which the law does not provide a remedy. But if

this stratagem should prevail, redress must follow too late, unless the entry of the tenant for life shall avoid the recovery; if it would, there is an end of the present question, for the jointress entered, and was entitled to the profits from Sir Robert Atkyns as a trespasser *ab initio*.

In every light, and upon every ground of law, this recovery is bad.

Notwithstanding these arguments, judgment was unanimously given for the defendant, on the ground that the plaintiff was barred by the statute of limitations, the ejectment not having been brought within twenty years after the lessor's title accrued. A writ of error was brought in the House of Lords, where it was also determined that the plaintiff was barred by the statute of limitations.

Vide Tit. 31. c. 2. § 34.

John Atkyns, the plaintiff in this cause, having died without issue, the person who was next in remainder under the will of Sir Robert Atkyns, brought an ejectment for the recovery of the same premises: and the validity of this recovery having been again discussed in the Court of King's Bench in Mich. 18 Geo. III. Mr. Justice Aston delivered the opinion of himself, Mr. Justice Willes, and Mr. Justice Ashurst, (Lord Mansfield being absent) that the recovery was void, because James Earle was not a good tenant to the *præcipe*, and judgment was therefore given for the plaintiff. The arguments which were made on that occasion are very accurately reported by Mr. Cowper; but as they are the very same which had been used on the former hearing, it is unnecessary to state them.

Cowper's R. 689.

Grant. Tit. 32. c. 4. § 45.

53. It has been stated, that where lands are let for years, the lessor may transfer the immediate estate of freehold in possession by grant; and though a tenant

to the *præcipe* is never made by grant, yet it may sometimes happen, that the conveyance of an estate can only operate by way of grant, in which case it will be construed in that manner.

Bargain and Sale enrolled. Tit. 32. c. 9.

54. A good tenant to the *præcipe* may be made by bargain and sale enrolled, and the bargainee may appear and vouch before entry, or before the bargain and sale is enrolled, provided it be enrolled within six months, as prescribed by the statute. For although the freehold does not pass from the bargainor until the enrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor at the time when the bargain and sale was executed, by relation. And as common recoveries are much favoured by the courts of law, a bargain and sale to make a tenant to the *præcipe* will not be deemed void on account of any trifling mistake or inaccuracy.

Robinson v. Comyns, Forrest, 164.

Lloyd v. Say and Sele, Tit. 32. c. 19. § 26.

Lease and Release.

55. A tenant to the *præcipe* may also be made by lease and release; and the reservation of a peppercorn in the bargain and sale for a year is a sufficient consideration to raise a use in the bargainee, so as to make the release valid, for the purpose of supporting a common recovery.

Barker v. Keate, Tit 32. c. 11. § 15.

A Recovery good after 20 Years, though the Deeds to make a Tenant to the Præcipe are lost.

56. By the statute 14 Geo. II. c. 20. § 5. reciting that it had frequently happened, that the deeds for making the tenants to the writs of entry, or other writs for common recoveries, had been lost, it is enacted, that every common recovery then suffered, or thereafter to be suffered, should, after the expiration of 20 years from the time of the suffering thereof, be deemed good and valid to all intents and purposes, if it appear upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate

and power to suffer the same, notwithstanding the deed or deeds, for making the tenant to such writ, should be lost or not appear.

A Recovery sometimes good without a Tenant to the Præcipe. 10 Mod. 45. Godb. 147.

57. Although in general a common recovery is not valid without a tenant to the *præcipe*, yet in some cases a common recovery may operate by estoppel, though there be no tenant to the *præcipe;* but this is only where the person who suffers the common recovery is tenant in fee simple; for the issue of a tenant in tail cannot be bound by estoppel, as they do not claim from their immediate ancestor, but from the first purchaser, *per formam doni.*

TITLE XXXVI.

RECOVERY.

CHAP. III.

Of Voucher, Judgment, and Execution.

1. *Of Voucher.*
6. *Of vouching in Person or by Attorney.*
15. *Rules of Court respecting Warrants of Attorney.*
18. *Of the Writ of* Summoneas ad Warrantizandum.
26. *Of Judgment.*
31. *It relates to the Return Day of the Writ.*
40. *But cannot relate to a Sunday.*
42. *Of Execution.*
48. *May be had against the Heir.*
50. *Must appear upon Record.*
52. *All the Proceedings in Recoveries may be enrolled.*
53. *After* 20 *Years, the Deeds to make a Tenant to the* Præcipe *are sufficient Proof of a Recovery.*

Section 1.

Of Voucher.

IN describing the manner of suffering a common recovery, it has been said, that when the tenant to the *præcipe* appears in court to answer the demandant's writ, he, instead of defending the title to the land, vouches, that is, calls on another person, who is supposed to have warranted the title to him at the time of the original purchase, and prays that the said person may be called in to defend the title which he warranted, or otherwise to give lands of equal value to those which he shall lose by the defect of his warranty. 1 Inst. 101 *b.*

2. In all real actions the demandant has a right to counterplead the voucher; that is, to show in his replication that the tenant ought not to be allowed such a voucher; and the vouchee may also counter- Pigot, 15.

plead the warranty, by showing that he was not obliged to warrant the lands to the tenant. But when a person is vouched to warranty, and enters of his own accord into the warranty, the law presumes that he parted with his possession with warranty, and comes in now to warrant the same possession, otherwise he would not enter into the warranty, but would counterplead it, for he may demand the lien; and if the tenant shows a lien, he may counterplead it. But if he enters into the warranty without demanding a lien, no person can afterwards aver that there was no warranty; for when the vouchee, by entering into the warranty, binds himself to render in value, in case the demandant recovers, the cause of warranty is not examinable either by a privy or a stranger, because the law will presume that the vouchee was compellable to enter into the warranty, otherwise he would never run such a risque.

1 Inst. 265 *b*. 3. When the vouchee has entered into the warranty, he comes *in loco tenentis*, and in judgment of law, is tenant to the demandant; and then the demandant counts against him as he did before against the tenant; and the vouchee may plead all those pleas which the tenant might have pleaded, and also any pleas which may arise after he has entered into the warranty.

Jenk. Cent. 100. 4. Thus, if a *præcipe quod reddat* is brought against A., who vouches B., who enters into warranty, and afterwards the demandant releases all his right to A.; there, although A. cannot plead this release, because from the time when B. entered into the warranty A. was not before the Court, yet B. may plead this release, or may plead a release to himself from the demandant.

5. The demandant may release to the vouchee, although the vouchee has nothing in the land; for when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him on account of the privity which is between them. And if a fine be levied by a vouchee to a demandant, or by a demandant to a vouchee, it will be good, because the vouchee is supposed to have the freehold. 3 Rep. 29 *b.* Tit. 35. c. 5. § 34.

Of vouching in Person or by Attorney.

6. If the vouchee is present in court, he immediately enters into the warranty; in which case, the entry in the record is thus: "And the said William, in his proper person, cometh and defendeth his right, when, &c. and thereupon voucheth to warranty Roger Blagrave, Esq. who is present here in court, in his proper person, and freely warranteth to him the tenements aforesaid."

7. It frequently happens, that neither the tenant nor the person vouched can conveniently appear personally in court, in which case they make warrants of attorney to some other person to appear in their stead. The warrant of attorney of the tenant to the *præcipe* is thus: "A. B. puts in his place C. D. and E. F., his attorneys, jointly and severally, against J. B., to gain or lose in a plea of land, &c." And if the person who comes in as vouchee makes a warrant of attorney, it is thus: "J. K., whom A. B. voucheth to warranty, putteth in his place L. M. and N. O., his attorneys, jointly and severally, against J. B., to gain or lose in a plea of land, &c."

8. These warrants of attorney must be acknowledged either before a judge, who is to sign them, or before the justices of assise where the lands lie; or else before commissioners appointed by a writ of *dedimus potestatem de attornato faciendo*; who must

certify the names of the persons whom the tenant and vouchee appoint for their attorneys, under their hands and seals.

Fitz. N. B. 17.

9. This writ of *dedimus potestatem* is not founded on the statute of Carlisle, which only extends to persons intending to acknowledge fines, but is a writ provided by the common law, to enable persons sued in real actions, who cannot appear personally in court, to appoint attorneys in their stead; and where a common recovery is suffered in this manner, the warrant of attorney is the foundation of the recovery, all the subsequent proceedings being, in fact, mere matters of form.

Wynne v. Wynne, infra.

10. If a tenant or vouchee, who has appointed an attorney for the purpose of suffering a recovery, dies before such attorney has actually appeared for him, the recovery will be void: because the death of such tenant or vouchee is a determination of the warrant of attorney; and that circumstance may be averred, it not being contrary to the record.

Bolderow v. Futter, infra.

11. If the warrant of attorney appears to have been given after judgment, the recovery will be void; for the writ of *dedimus potestatem de attornato faciendo* recites, that the writ of entry is pending, which is not the case after judgment; and the appearance of the attorney before the warrant was made was without authority, and therefore void.

12. The acknowledgement of a warrant of attorney may be void, and, of consequence, the recovery suffered pursuant to such warrant, on account of any legal disability in the person who acknowledges it; and such disability may be averred; in which it differs from the acknowledgement of a fine before commissioners appointed by a writ of *dedimus potestatem*: for the acknowledgement of a fine is the assent of

infra, c. 11.

the party to the accommodation of the suit, by which it is absolutely completed, and the entry of the concord is the same as entering up judgment; but the acknowledgment of a warrant of attorney to suffer a recovery, is nothing more than a judicial mode of appointing another person to appear in court for the tenant or vouchee, and is no part of the record; hence these two acts are attended with very different consequences.

13. By the statute 23 Eliz. c. 3. § 5. it is enacted, that every person who shall take the knowledge of any warrant of attorney, of any tenant or vouchee, for suffering of any common recovery, shall, with the certificate of the warrant of attorney, certify also the day and year whereon the same was acknowledged. And that no person who takes any such knowledge of any warrant for any recovery, shall be bound to certify such warrant, except it be within one year next after the said knowledge taken; and that no clerk or officer shall receive any writ of entry whereupon any common recovery was thereafter to pass, unless the day of the knowledge of the warrant appeared in or by such certificate. 1 Taunt. 418.

14. It has been lately held by the Court of Common Pleas, that where there are several vouchees, they must all join in one warrant of attorney; for though all the vouchees should appoint the same attorney, yet if there are several warrants of attorney, and several captions, the recovery will not be allowed to pass. Jennings v. Vernon, 3 Bos. & Pul. 361.

15. By a rule of court made in Hil. 14 Geo. III. for the more effectual and certain proof of the due acknowledgement of warrants of attorney taken from the tenants or vouchees in common recoveries, by virtue of any writ of *dedimus potestatem*, it is ordered Rules of Court respecting Warrants of Attorney.

by the Court, "that no common recovery, wherein the tenant or tenants, vouchee or vouchees, or any of them, shall appear and defend by attorney, shall be arraigned at the bar, unless an affidavit or affidavits in writing, on parchment, shall be made and annexed to a copy of the *præcipe*, and warrant or warrants of attorney, acknowledged by such tenant or tenants, vouchee or vouchees, by virtue of any writ or writs of *dedimus potestatem;* in which affidavit or affidavits, the person or persons making the same, shall swear that he or they knew the party or parties acknowledging such warrant or warrants of attorney; that the same was or were duly signed and acknowledged upon the day and year, or several days and years, mentioned in the caption or several captions thereof; that the party or parties acknowledging, and also the commissioners taking the same, were all of full age and competent understanding; that the femes covert (if any) were solely and separately examined, apart from their husbands, and freely and voluntarily consented to acknowledge the same; that all the said parties knew the same warrant or warrants of attorney was or were intended for suffering a common recovery to pass his, her, or their estate or estates; and further, that the razure or razures, interlineation or interlineations (if any), in the body or caption of such original warrant or warrants of attorney, was or were made before the said parties or any of them signed the said warrant or warrants, and before the commissioners signed the said caption or captions: which affidavit or affidavits (together with the said copy of the *præcipe*, and warrant or warrants of attorney, whereunto the same shall be annexed) shall be filed in the office of enrolment of writs for

fines and recoveries. And it is ordered, that all and every such affidavit or affidavits as aforesaid, shall be made by some attorney or attorneys of the courts of Westminster-hall, or of the sessions in Wales, or of the counties palatine of Chester, Lancaster, or Durham; and shall be sworn before a person duly authorized to take affidavits in this court, except where the party or parties respectively, at the time of their acknowledging such warrant or warrants of attorney, shall be in that part of Great Britain called Scotland, or in Ireland, or in some other parts beyond the seas. And in case the said party or parties shall be in Scotland, then the said affidavit or affidavits shall be made by one of the clerks of his Majesty's signet, and sworn before one of the Judges, or other person duly authorized to take affidavits or depositions in the Court of Session, or Court of Exchequer, in that part of the United Kingdom. But if the said party or parties shall be in Ireland, or in any other parts beyond the seas, then the said affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgement of such warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in this court, or before some magistrate of the place where such acknowledgement shall be taken, having authority to administer an oath, and in the presence of a public notary, which notary shall also certify in writing, under his hand and seal, as well the due administering of the said oath, as also the name, signature, and office of the magistrate administering the same."

16. By a rule of court made in Mich. 29 Geo. III. it is ordered, that no common recovery be suffered to pass, unless the taking of the warrants of attorney

be before one of the Justices or Barons of his Majesty's courts of record at Westminster, or one of the Serjeants at Law, unless an affidavit be made and filed, stating that the commissioners taking the same are either barristers of five years standing, or solicitors or attorneys of some of the courts in Westminster-hall, the Judges of the Court of Session or Exchequer, or advocates or clerks of the signet of five years standing, in Scotland.

Ex parte Worseley, 2 H. Black. R. 275.

1 H. Black. R. p. 527.

17. By a rule of court made in Trin. 30 Geo. III. it is ordered, that from and after the first day of Mich. term then next ensuing, in every common recovery wherein the tenant or tenants, or the vouchee or vouchees, warrant or warrants of attorney shall be taken under a *dedimus potestatem*, there shall be written on every copy of the *præcipe*, and of such warrant of attorney having such affidavit or affidavits as is or are required by the rule of this court made in Hil. 14 Geo. III. thereto annexed, the *allocatur* of the Lord Chief Justice, or some one other of the Justices of this Court, in the same or like manner as *allocaturs* are now written on fines taken by *dedimus potestatem;* and the copy of the *præcipe* and warrant or warrants of attorney with the *allocatur* thereon, shall be filed as directed by the said rule; and that at the time of signing such *allocatur*, the writ of entry for such common recovery shall be produced before the judge signing such *allocatur*, who may mark such writ with his title, name, or initials thereon; and such writ shall also be produced at the time of the arraignment of such recovery.

Of the Writ of Summoneas ad Warrantizandum.

18. If the person whom the tenant vouches be not in court, then a writ of *summoneas ad warrantizandum* issues, to compel the vouchee to appear in court, and warrant the land.

19. In adversary suits, if upon a writ of *summoneas ad warrantizandum*, the sheriff returned the vouchee summoned, and the vouchee made default, a *capias ad valentiam* issued for the tenant. But if the sheriff returned *nihil* upon the summons, an *alias* and a *pluries* issued, and then a *sequatur sub suo periculo;* and if the vouchee still made default, judgment was given for the demandant; but no judgment was given for the tenant, because it appeared that the vouchee had not assets.

Booth, 43. Pigot, 148. 1 Inst. 101 *b.*

20. Where the vouchee, who comes in upon a writ of *summoneas*, appears by attorney, the warrant ought to bear date after the *teste* of the writ of *summoneas*. But still the omission of this circumstance will not invalidate a recovery.

21. In a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the writ of *summoneas;* to which it was answered, that the vouchee might appear in person without any writ of summons, and therefore that the recovery was good, and the process void.

Wynne v. Lloyd, T. Raym. 16. 1 Sid. 213. 1 Lev. 130.

The Court said, that a common recovery being a common assurance, they would intend another warrant of attorney, made in due time.

22. By the common law, a writ of *summoneas ad warrantizandum* had nine returns. By the statute 16 Cha. II. c. 16. § 10. the returns were abridged to five; and now, by the statute 24 Geo. II. c. 48. § 8. they are reduced to four inclusive: as if the writ of entry is returnable on the morrow of All Souls, then the writ of *summoneas* must be returnable from the day of St. Martin in fifteen days, being the fourth and last return of Michaelmas term. And if there are three vouchers, the writ of summons for the

second vouchee is to be returnable four returns, both inclusive, from the return of the summons of the first vouchee: and writs of summons are tested four days inclusive from the writ of entry.

23. The Court of Common Pleas will not enlarge the return of a writ of summons, so as to make a term intervene between the *teste* and the return.

24. Thus where a motion was made in Easter term 18 Geo. III. that the writ of summons in five recoveries might be tested in the Michaelmas term preceding, and be made returnable in that Easter term, instead of the usual course authorized by the statute 24 Geo. II. c. 48, which is, that it should be tested the fourth day inclusive from the return of the writ of entry, and be returnable the fourth return after the return of the writ of entry; in consequence of which writs of summons must be returnable either in the same term in which they were tested, or at farthest, in the very next term. The occasion of this application was, that Earl Cowper, the vouchee, had acknowledged the warrants of attorney to appear to the summons, before commissioners appointed by *dedimus* (which recited the summons as returnable in the preceding Hilary term) at Florence, on the 13th December 1777, but they did not arrive in England till after the end of Hilary term; and as the return is usually of the same term wherein the recovery is in fact arraigned at bar, and the *teste* must precede the actual acknowledgement of the warrant of attorney by the vouchee, this proceeding could not be made regular, without suing out a writ of summons with a much longer return than the course of practice will at present allow. The like inconvenience must occur whenever the vouchee dwells in any distant

Barnard v. Woodcock, 2 Black. Rep. 1201.

country, as the East or West Indies; but that objection had been used to be cured in a very unwarrantable manner, by altering the date of the caption after it arrived in England, so as to suit the term in which the recovery was arraigned, till the late rule of the courtin Hilary term, 14 Geo. III. (which directs, *inter alia*, an affidavit to be made of the true time of taking the caption) put a stop to this, among other gross irregularities in the practice of suffering recoveries.

The Court conceived that they had not power to make such a rule, or at least that as they could not foresee all its consequences, it would be highly imprudent to authorize such a proceeding by a previous direction from the Bench; but intimated that no blame should fall on the officer who should make out the process as prayed for, but the same to be at the hazard of the parties, and without prejudice to any future question that might arise on the validity of such recoveries.

Gibbons v. Stevenson, 2 Black. Rep. 123.

25. A motion similar to this one was made in Mich. 19 Geo. III. and received the same denial from the Court. The facts were, that the *dedimus* was tested the 26th February 1777, and recited a writ of summons returnable the first day of Easter term 1777; so that properly the summons should have been returnable, and the recovery had, in Hilary 1778, which the distance rendered impossible. Therefore, on application to the Master of the Rolls, he ordered the cursitor to make out a writ of entry returnable in Michaelmas term 1777; upon which the officer made out a writ of summons returnable in the next Hilary term, of which term the tenant's appearance was entered; and then they imparled

from Hilary to Easter, from Easter to Trinity, and from Trinity to Michaelmas, when the recovery was arraigned. And if the vouchee was then living, it was apprehended that the recovery would be valid; but if he was dead, it would be erroneous.

Of Judgment.

26. In consequence of the default made by the person who is last vouched in a common recovery, and his departure in despite of the court, judgment is given that the demandant shall recover seisin of the lands in question, and that the tenant shall recover against the vouchee lands of equal value to those warranted by him, and now lost by his default: and as soon as judgment is given, the recovery becomes binding on all the parties to it, and their heirs.

27. The entry of the judgment upon the record is thus—" Therefore it is considered that the aforesaid W. G. do recover his seisin against the said W. L. of the tenements aforesaid, with the appurtenances; and that the said W. L. have of the lands of the aforesaid W. G. to the value, &c."

1 Inst. 9 *b.*

28. In every common recovery the demandant acquires by the judgment the fee simple of the lands recovered, although the word *heirs* be not mentioned; because the writ being brought for the absolute property of the lands, if judgment is obtained, it must be for so much as was demanded in the writ; and in all adversary suits, every recoveror recovered a fee simple.

Burton's Case, ante, c. 2. § 9.

29. If judgment be given in a common recovery before the return of the writ of entry, or where the vouchee is summoned, before the return of the writ of *summ[illegible]as*, it is void; because the court has no power to proceed until the return of the writ of

entry, and the appearance of the vouchee: for the parties are not supposed to appear until the return of that process, which issues for the sole purpose of bringing them into court.

30. In every species of action the death of either of the contending parties puts an end to the suit; and therefore, in a common recovery, if either the demandant, the tenant, or any of the vouchees, die before judgment is given, the recovery is void.

It relates to the Return Day of the Writ. 4 Rep. 71 *a.* Pigot, 59.

31. Judgments however are not always considered as having been given on the day on which they are pronounced, but have frequently a relation to the first or some other day of the term in which they are given. And if all the parties are living on the day to which the judgment relates, the recovery will be good; for the Judges take no notice of the day on which the recovery was passed in court.

Tit. 35. c. 2. § 73.

32. It has been stated, that all judgments relate to the first day of the term. But in the case of a common recovery, if the writ of entry is returnable on the second or any other return day of the term, the judgment will then relate to that return day, and not to the first day of the term; for the courts will not consider the judgment to have been given prior to the return of the writ of entry. And where the term, by the proceedings in it, suffers a division, as where any process issues during the continuance of the term, then the judgment relates to the essoign day of the return of that process, and not to the first day of the term.

Selwin v. Selwin, 2 Burr. 1131.

33. It follows, that when the vouchee in a common recovery appears in person at the return day of the writ of entry, there the judgment relates to the return day of the writ of entry, and is considered in law as having been given on that day. But if the vouchee

appears upon a writ of *summoneas ad warrantizandum*, there the judgment relates to the day of the return of that writ. And if the parties are alive at any time of the return day, the recovery will be good; for the law makes no fractions of a day, but every act of record is supposed to be done on the first instant of the day.

Shelley's Case, 1 Rep. 93.

34. Edward Shelley suffered a common recovery, in which he was vouched by attorney on the 9th of October, which was then the first day of Michaelmas term, and died before six in the morning of that day: the recovery was passed the same day about ten o'clock.

It was adjudged, that the death of Edward Shelley did not invalidate the recovery, for the writ of entry was returnable on the octave of St. Michael, and the judgment had relation to that day, which was the said 9th day of October, on which day the vouchee was alive; and the law makes no fractions of a day.

35. If a warrant of attorney bears date after the return day of the writ of entry, on which a recovery is suffered, the recovery will be void; because the judgment relates back to the return day of the writ of entry.

Bolderow v. Futter, Dyer, 220 *a.*

36. A writ of entry was returnable on the octave of St. Michael, which was the 9th of October; the writ of *dedimus potestatem de attornato faciendo* bore date the 11th of October, and the *mittimus* thereof bore date the 30th October.

It was adjudged, that the recovery was erroneous; because the judgment, on whatever day of the term it was given, related back to the return day of the writ of entry, which was the first day of the term;

so that the warrant of attorney was made after the time when the judgment was supposed to be given.

37. If a vouchee in a common recovery, who comes in upon a writ of *summoneas*, and appears by attorney, dies before the return of the writ of *summoneas*, the recovery is void; because the judgment could not possibly have been given in such recovery until the vouchee had appeared in court and made default; and as the vouchee could not appear until the return of that process which issued for the sole purpose of bringing him into court, it follows that judgment must have been given after the death of the vouchee, which was a determination of the warrant of attorney. And these facts, being collateral to the record, may be assigned for error.

38. Thus in a writ of error to reverse a common recovery, it appeared by the record that a writ of entry *sur disseisin en le post* was brought by Sir Watkin Williams Wynn, returable *quinden. Pasch.* 13 Geo. II. against William Thomas, who appeared in person and vouched James Apperley and Alithea his wife; whereupon a writ of *summoneas ad warrantizandum* was awarded, returnable in *crastino Ascensionis Domini* (which was on the 16th of May), on which day the said James Apperley and Alithea his wife appeared by Josiah Hodgson their attorney, and entered into warranty, and vouched over the common vouchee, who made default, whereupon judgment was given, and a writ of seisin awarded; and the sheriff returned that he had delivered seisin. The error assigned was, that Alithea died before judgment was given in the said recovery, and for this the plaintiff in error prayed that the recovery might be reversed. Issue was joined, that Alithea did not die before judgment. A special verdict was found,

Wynne v. Wynne, 1 Wils. R. 35.

that Alithea died on the 10th day of May, six days before the return of the writ of *summoneas ad warrantizandum*; but whether she died before judgment or not, the jurors left to the opinion of the Court. This case was argued on behalf of the plaintiff in error by Mr. Clive, who made two points: First, That the death of Alithea Apperley, vouchee and tenant in tail, as found by the special verdict, made the judgment in the common recovery erroneous. Secondly, That upon the whole record, and the continuances as entered, the judgment appeared to be given, and the recovery passed, after the death of the vouchee, and could not be made good by relation, as a judgment of recovery in her lifetime. In support of these positions he argued that recoveries were erroneous where the vouchee or other necessary party did not appear, either in person or by attorney; for without an appearance there could be no warranty, no vouching over the common vouchee, and consequently no judgment. In this case Alithea the vouchee did not appear in person; the first consideration therefore was, whether the appearance of Josiah Hodgson, her attorney, was a proper appearance or not. And, with regard to that matter, taking the facts simply as they appear on the record, the vouchee neither appeared in person nor by attorney, for the death of the vouchee, before the time when the attorney actually appeared, was a determination of the warrant of attorney. In the case of Wynne v. Lloyd the error assigned was, that there was no warrant of attorney at the time of appearance, for it appeared the *teste* of the warrant of attorney was after appearance: the Court in effect agreed, that an appearance, without a warrant of attorney, was error, even in the case of a person of full age; but they made the recovery good by an

MSS. note.

ante, § 21.

intendment, that the vouchee came in *gratis* before the writ of summons, and made a new warrant of attorney in due time; which showed there must be a warrant of attorney whenever the vouchee appeared by attorney. If a tenant in tail within age is vouched in a common recovery, and appears by attorney, it may be assigned for error; for such an appearance is void. If warrants of attorney were not duly filed, it was error sufficient to reverse or arrest a judgment after verdict, before the statutes 32 Hen. VIII. c. 30. and 18 Eliz. c. 14.; and since these statutes, it is still error, except after verdict; for the statute 4 & 5 Ann. c. 16. which extends these statutes of jeofails to judgments by default, &c. (which is the present case) has a saving, so as there be an original writ or bill and warrants of attorney duly filed, according to the law, as is now used. If the want of form in filing them was error, want of authority in the attorney, by reason of the determination of his warrant, was much more erroneous. Therefore, if a vouchee must appear in person, or by attorney, before judgment can be given; and where the appearance is by attorney, if such attorney must have a proper warrant or authority to appear, and the want of such warrant is error, it is equally certain that the death of the vouchee before appearance is a countermand or determination of the warrant of attorney; for a warrant of attorney to appear or confess judgment is a naked authority, not coupled with any interest, and no more than an instrument, enabling the attorney to do an act which the principal himself might have done in person. And as it is absurd to say that a man can acknowledge a judgment or appear in a court of justice after he is dead, so it is as unreasonable to admit that another person should be capable of re-

Darcy v. Jackson, Palmer, 224. Holland v. Dantzey, Cro. Eliz. 739.

presenting him on such occasions. The personal capacity of the principal, and the derivative authority of the attorney, are founded on the same principle, namely, the life of the party; and therefore they must both end at his death. If a man gives a warrant of attorney to confess judgment, and dies before the judgment is confessed, the death is a countermand. If a tenant or vouchee died before judgment, and judgment had afterwards been entered, it would be erroneous. Thus, where a writ of error was brought to reverse a judgment in C. B. the error assigned was, that judgment was given against a dead person, the defendant dying after the day of Nisi Prius, and before the day in Bank: and the Court were all of opinion, that the judgment being given against a defendant who was dead, it was erroneous, and must be reversed. That case was before the statute 17 Car. II. c. 8. which provides a remedy where either party dies after a verdict, and before judgment, and gives a power to enter up judgment within two terms after the verdict. The case was the same at common law before the statute 17 Car. II. c. 8.: but by the statute 8 & 9 Wil. III. c. 11. § 6. it is provided, that if a plaintiff or defendant dies after an interlocutory, and before a final judgment, the action shall not abate, but the plaintiff may, notwithstanding, proceed to a final judgment. These statutes show what the common law was, and how a judgment against a dead person was to be considered. If a tenant in a real action dies pending the writ, and judgment is afterwards given, it is error, because given against a dead person. Thus the common law stands with regard to plaintiffs or defendants dying before judgment in real and personal actions; and there is no act of parliament

1 Inst. 52 *b.* 1 Vent. 310. Salk. 87.

Jourden v. Denny, 2 Bulst. 241.

1 Roll. Ab. 768.

which alters the common law in this case. The present action is a real action; it is a writ of entry upon a disseisin; and Alithea Apperley the vouchee, after appearance, and entering into the warranty (admitting that to be the case), was the tenant in law; and her death before judgment was the same as if any other tenant had died, in case an action had been only between demandant and tenant, without any vouchee. Every vouchee may take advantage of any error between the other parties: the second vouchee may assign error between the tenant and the first vouchee. The reason is, because the judgments are several and distinct; for in every common recovery there are several judgments, and several recoveries are included; and it ought to appear that all of them are regular and against proper parties, and that all the parties are before the court. Littleton says, if in a *præcipe quod reddat* the tenant vouches, and the vouchee enters into a warranty, if afterwards the demandant releases to the vouchee, it is good: for the vouchee, after he hath entered into the warranty, is tenant in law to the demandant. So in 1 Inst. 265 *b.* it is said, that when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him in respect of the privity between them. These authorities show that the same regularity, even in process, is required to bring in the vouchee upon a voucher, as is requisite to bring in the tenant at first; and that the vouchee, after he hath agreed and entered into the warranty, is considered in this action as actual tenant of the freehold: and it has been shown, that if the tenant dies before judgment, it is error, and the law is the same if the vouchee dies before judgment. It follows, that as the verdict finds the vouchee died

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Pigot, 196.

upon the 10th of May, which by the record appears to be prior in time to any appearance of the vouchee, (for that was not until the 16th of May), and no judgment was or could be given till after appearance, that therefore it was an erroneous judgment, being given after the death of the vouchee.

With respect to the second point, two objections were made by the counsel for the defendant; first, that the assignment of error and finding the special verdict, was against the record; and secondly, that the judgment had relation back to the first day of the term, on which day the vouchee was alive. The argument respecting the first of these objections, will be stated in the last chapter of this work.

As to the second objection, it was true that the term to many purposes was considered as but one day, and that a judgment given the last day of the term related back to the first day: but this rule was only applicable to cases between plaintiffs and defendants, where there was no continuance entered from one day to another in the same term, no fraction of the term by any thing appearing on the record, nor no injury to any third person; as it is one entire transaction on the record of that term, it is all considered as done on the first day of the term. But this judgment differs materially from the ordinary course of judgments, to which the rule of relation is generally applied: the record shows that the term cannot, on this occasion, be considered as one day, for the continuance from one day to another shows that different facts were done on different days in the same term. On these days of continuance the parties might have shown any matter to the court; they might have shown on the morrow of the Ascension that Alithea was dead, that she died on the 10th of May, and then the recovery would not have passed.

These continuances, therefore, take away all presumption and possibility that the judgment was given on the first day of the term, for such a presumption would be directly contrary to the record; and it would be an extraordinary doctrine to say, that no averment shall be admitted against a record, and yet that the court shall be at liberty to presume a matter against a record; viz. when the record says a *placitum* was pending on the 16th day of May, that the court should presume the judgment was given long before that period. The relation or fiction of law, in the ordinary course of judgments, is not against the record; and that is the reason why the court should not consider this judgment as given the first day of term, *stabitur præsumptio donec probetur in contrarium;* and here is the highest evidence to the contrary, the record itself. In Shelley's case, the recovery was held to be good, because he was alive on the day on which judgment was given, though he died before the court sat, because the court would not allow a fraction of a day; but if he had died the day before judgment was given, it would have been void; for although the court would not allow a fraction of a day, yet it would allow a fraction of a term. All the court did in Shelley's case, was extending the relation to the first instant of the day, in support of a judgment given on that day. A judgment shall have relation to the first day of the term, as if it was given on that very day, unless there is a memorandum to the contrary on the record, as where there is a continuance of the cause until another day in the same term, and the present cause was continued until another day in the same term. In all cases of judgments by default, they do not relate back to the essoin day, which is the first day of term, but to Buls. 35.

the *quarto die post;* for the Court takes notice judicially, that the party was not demandable before that day, and consequently, could not till then be guilty of a default: he might have appeared the first day of term, if he pleased, and then the judgment would have been given on the first day of term. So here the vouchee might have come in *gratis* before the morrow of the Ascension, but she did not; there was no appearance until that time, and, as the judgment could not have been given until that day, it cannot relate back to a prior day, so as to prejudice a third person. These reasons and cases show, that judgments do not universally, and in all cases, relate to the first day of term, and particularly that the judgment in the present case cannot have such a relation, because the record shows it is impossible that it should.

This case was several times solemnly argued at the bar of the King's Bench; and Lord Chief Justice Lee, for himself and the other Judges, gave judgment. And in summing up the arguments, he reduced them to these three principal points: 1st. That it was insisted on for the defendant in error, that a recovery was a common assurance; and as the vouchee had done all he could (if he had lived) to perfect it, the Court would give it an equitable construction, and not suffer it to be reversed for so small a fault, if it should be deemed one. 2dly. That the recovery should be deemed perfect from the first day of the term wherein it was passed, and then the vouchee was alive. And though the judgment was actually given after his death, yet that should have relation to the first day of term, as in the case of many other judgments. 3dly. That as the vouchee appeared by attorney at the return of the summons, and that appearance was entered on record,

this was an error in fact against the record, which would not be allowed.

To these three objections to the writ of error, the Court gave these answers: that as to the first, the recovery being a common assurance, ought and should be supported as far as the law would allow of; but that they could give it no equitable constructions which create absurdities, as it would apparently be if they should suffer judgment to be entered against a dead person.

To the second, that it was very true in many cases, where judgments were entered in the vacation, they should have relation to the first day of the preceding term, but that was never the case where continuances were entered on record: for, whenever there are continuances entered from time to time (as in the case of a recovery), and judgment is afterwards given, that judgment can have relation no farther backwards than to the time of the last continuance or rest; and here the time of the last continuance or rest was the return of the writ of summons; for then the demandant imparles, and judgment was not, nor could not be given, till he came again.

To the third, that the death of the vouchee was a collateral matter, not contrary to the record, and therefore the plaintiff was not estopped from assigning it for error. The recovery was therefore reversed.

39. In another case, where a writ of error was brought from the Court of Common Pleas to reverse a common recovery, and the error assigned was, the death of the vouchee before judgment; the defendants pleaded *in nullo est erratum*, which confesses the error assigned to be true. Lord Mansfield said it was plain, that judgment could not be given against a man after he was dead. That there could have been no

Sheepshanks v. Lucas, 1 Burr. 410

judgment against the tenant to the *præcipe* in a common recovery, without a judgment over in value against the vouchee; they were all entered at the same time, and were part of the same proceeding. The recovery was unanimously reversed; and it was said, that the case of Wynne and Wynne was an authority in point.

But cannot relate to a Sunday.

40. If a writ of *summoneas* be returnable on a Sunday, and the vouchee dies on that day, the recovery is void, because Sunday being a *dies non juridicus*, judgment could not possibly have been given till the Monday following; consequently the judgment must have been given after the death of the vouchee.

Swann v. Broom, 3 Burr. 1595. 1 Black. Rep. 496. 526.

41. Thus, where a writ of error was brought in the Court of King's Bench from the Court of Common Pleas, to reverse a common recovery, and the error assigned by consent was, "that the day of the return of the writ of summons was on Sunday, the 13th of May 1750, on which said 13th of May Edward Swann, the vouchee in the common recovery, died." Two questions arose on this case. 1st. Whether the judgment could relate to the essoin day of the term, or to any day prior to the 13th of May, the essoin day of the return. 2dly. Whether, by law, a valid judgment could possibly be given on the day of the return, being Sunday?

Lord Mansfield delivered the resolution of the Court, that the recovery was bad, because no judgment could, in this case, be supposed to be given before the death of the vouchee. That this judgment could not relate to the first day of the term, because it could not be given before the return of the writ of summons, which appears, by the record, to be in the term. That it could relate only to the essoin day of the writ of summons, which was upon Sunday; and as the courts do

not sit on a Sunday, judgment could not possibly have been given until the Monday, when the vouchee was dead.

To reverse this judgment, a writ of error was brought in the House of Lords, and, on behalf of the plaintiff it was insisted, that Edward Swann the younger, being alive on the day he was called to appear, and having appeared by his attorney, on the return day of the writ of summons to warranty, to which day the judgment in the Common Pleas must necessarily relate, must be alive when the judgment was given against him, and therefore the recovery was good. That this position follows from the reasons and authorities of legal relations of judgment, viz. that the term be considered in law as one day. Judgments in general relate to, or, in law, are supposed to be given, and receive a construction as if they had been given, on the first day of the term, and that is the essoin day. But in particular cases, where the term, by the proceedings in it, suffers a division, as in the present case by the summons to warranty, the judgment relates to the essoin day of that return; on which day, it was admitted by the record, that Edward Swann the younger was alive. It is, however, objected, 1st. That the essoin day was Sunday, on which day the Court never sits, and so cannot be supposed to have given judgment on that day. 2d. That the Court never did sit on a Sunday, nor could it sit on that day, because forbid by several canons which were adopted by the common law. To the first objection it was answered, that courts formerly commenced all law-business on the essoin days, which were Sundays or festivals, and so might pronounce judgment on those days. The authorities in the books are many and uniform, that the judgments given in term-time all bear relation to that day, whe-

6 Brown Parl. Ca. 333.

ther a festival or not; and the reason is the same where the process is returnable in the middle of term, before the relation to the essoin day of that return. That the entry, in the present case, which says, *at which day comes here as well the said Thomas in his proper person, as the said George by John Glasse his attorney; and the said Edward being summoned, &c. likewise comes, &c. and afterwards departs in contempt of the Court*, was also an estoppel to say, that the judgment was not given on that day, or that it was given on any day before, or even after that day. As to the other objection, it was said, that the very canons prohibiting, were evidence of the fact of sitting on a Sunday; and it was further proved by the returns of the writs, all which were formerly on festivals; and in the year 1763, nine returns out of seventeen were on a Sunday, as appears by the almanack of that year. That it would be strange for the King, by his writ, to order the parties to appear on a day on which no Court was or could be held, if they were not to sit on that day. Besides, the many cases of testing and returns of writ, adjourning terms, casting or warranting essoins, &c., all which were equally objects of the canon law, prove the fact of courts actually sitting on Sundays. As to the canons, they could only have the same force as in other cases, when adopted; viz. to subject to spiritual censures, but not to invalidate the act; like to the canons against holding fairs on a Sunday, which was also prohibited by statute, under temporal penalties; but the contract was binding, till at last, by another statute, the contract was made invalid. But as no act extended in words to the present subject, therefore it was not against the common law for the Court to sit and pronounce judgment on that day; or by construction or intendment of law, the judgment, as

given in this case, as the entry imported, the Court must intend that it was given on that day. If the canon had been adopted, *i. e.* incorporated into our law, and if, in after times, the Legislature had thought it necessary to forbid judgments having relation to the essoin days, they would then have changed the return of the writs; for it is now necessary to take out the writs returnable on the general return days, and the greatest part of these are Sundays; and as they must be considered as common days of return, and as the judgments necessarily relate to these days and no other, if Sundays are to be for this purpose taken as *dies non juridici*, then most of the judgments given in term must necessarily be bad, as bearing relation to that illegal day; and thus the return days would remain as so many snares for error. But it may be presumed, the Legislature did not thus consider it; and thought the returns and relations of law might still remain, though they knew that the courts, in decency, only sat on Mondays, and that the legal relation to Sunday of the judgment given on Monday, could be no violation of the Sabbath, and would still preserve private rights. For the profanation of the Sabbath was the only object of the Legislature, but it never intended to interfere with private rights.

On the other side, it was said, that a common recovery, though now become a usual mode of conveyance, must necessarily be attended with all the ceremonies and solemnities of an actual suit at law; and if those are wanting, the conveyance by recovery is as defective as a will devising lands, to which there are only two subscribing witnesses. That as the recovery pursues the forms of a real action, it is of absolute necessity that the vouchee, against whom the judgment is obtained, should be living on the day when such judg-

ment is given by the Court, for otherwise such judgment is erroneous. That though, in all cases, the judgment shall relate as far back as can be permitted by the facts appearing on the record, yet no fictitious relation shall presume what is in itself impossible. In the present case, the writ of summons being returnable on Sunday the 13th of May, the judgment in the recovery was not, nor could be given till Monday the 14th of May; for though many nominal return days of writs were very anciently fixed on Sundays, yet both by law and practice, courts of justice cannot now sit upon a Sunday, but the business appointed for that day is, and always must be, dispatched upon the Monday immediately following. As therefore the vouchee died upon Sunday the 13th, the day preceding the judgment, the judgment was given against a person not *in esse*, and, consequently, was totally erroneous. That it was not sufficient to say the vouchee had done every act necessary to be done by him, that he had executed the deed to make a tenant to the *præcipe*, had acknowledged the warrant of attorney, and had thereby completed, in substance, every thing requisite to this particular mode of conveyance; for no warrant would empower an attorney to appear in the name of another, after the death of his principal. The vouchee, it was acknowledged, intended to perfect this conveyance, but died before he could accomplish it; and whether he died a day or a month too early, was quite immaterial. Every act done by him might have been done in the month of September, previous to a recovery intended to be suffered in Michaelmas term; and yet it would not be contended, that if such a vouchee had died in October, the recovery could have been perfected in the subsequent term. It was therefore hoped, that the judgment of

the Court of King's Bench, reversing the judgment in th erecovery, would be affirmed.

After hearing counsel on this writ of error, the Judges were directed to deliver their opinions upon the following question, viz. "Whether the recovery is good, or erroneous, the return day of the writ of summons being on Sunday, the 13th of May, on which day Edward Swann the younger died?" And the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the Judges present, acquainted the House, "that they all agreed in their opinion, that the recovery was erroneous." Whereupon, it was ordered and adjudged, that the judgment of the Court of King's Bench should be affirmed.

42. When the demandant has obtained judgment in a common recovery against the tenant, and the tenant against the vouchee, the Court awards a writ of *habere facias seisinam*, in the same manner as upon a judgment in an adversary action, to the sheriff of the county in which the lands lie, directing him to put the recoveror in possession of the lands which he has recovered; and when this writ is returned, the recovery is complete and executed.

Of Execution. 1 Inst. 361 *b.*

43. The writ of seisin should bear *teste* the fourth day inclusive after the return of the writ of entry, or last writ of summons, when the vouchee comes in by summons: and there should be fifteen days between the *teste* and the return of the writ of seisin.

Wilson, 373.

44. It is said in the case of Goodright v. Rigby, that the day named in the return of the writ of seisin is immaterial, it not being necessary to name any particular day, for the return would be good without it; all that was necessary was, that seisin should be delivered after the judgment, and before the return

ante, c. 2. § 25. 2 H. Black. R. 63.

of the writ, and that the proceedings should all be in the same term.

W. Jones 10. 2 Stra. 1185. 1 Wils. R. 55.

45. A judgment in a common recovery has no manner of operation, nor does it alter the nature of the estate, until it appears to have been regularly executed by the return of the writ of seisin; and as almost all common recoveries are now suffered to uses, the recoverors do not acquire any seisin, and consequently no use can arise until the recovery is executed; that is, until the writ of seisin is returned, for it is now never in fact executed.

5 Term R. 179.

Shelley's Case, 1 Rep. 106 *b.*

46. If a common recovery be suffered of lands let on leases for years, the recoverors have not the reversion presently by the judgment, but it must be executed.

1 Inst. 104 *b.*

47. By the statute 7 Hen. VIII. c. 4. all recoverors in common recoveries are allowed the same remedies against lessees for lives, and years, by distress, avowry, and action of debt, for rents and services which become due after the recovery, to which the persons against whom the recovery was had were entitled.

May be had against the Heir.

48. If a person suffers a recovery and dies before the writ of seisin is issued, the recoveror may have execution against his heir.

1 Rep. 93.

49. Thus, in Shelley's case, it was unanimously resolved, that although Edward Shelley died on the very day on which the recovery passed, and consequently before the writ of seisin could have been issued, yet that execution might be sued against his heir *.

Must appear upon Record.

50. The awarding of a writ of seisin, its execution, and return by the sheriff, must appear upon record:

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* In this case Lord Coke states the writ of seisin to have been awarded immediately after the judgment; and the record prefixed seems to warrant such statement.

and if the execution of a recovery be not found in a special verdict, it cannot be presumed by the Court.

51. Thus in ejectment the jury found a special verdict, that Henry VII. granted the manor of Witherslack to Thomas Earl of Derby, to hold to him and the heirs male of his body; that Thomas Earl of Derby, grandson to the said Thomas, suffered a recovery of the said manor, and afterwards entered into the said manor, and was seised thereof; but no writ of execution or entry of the recoverors appeared upon the special verdict in which this recovery was found: and the Court of King's Bench was of opinion, that as execution was not found, it could not be presumed, and therefore that the recovery was not good. A writ of error was brought in the House of Lords: and it was argued, that this judgment was erroneous, and that a writ of execution, though not expressly found, ought to have been presumed, for the following reasons: First, from the exemplification of the recovery itself, as found; its antiquity of above 230 years; its being entered upon the rolls; the dignity and quality of the parties to it; and a fresh entry of Earl Thomas, expressly found to have been made after such recovery. Secondly, from the impossibility of any other proof of actual execution, as it was well known, that amongst the rolls of the recoveries of that and the preceding reigns, the award of the writ of execution is not entered or indorsed upon one in twenty of them, as has been usual of late years; and upon search in the proper offices where the writs of execution of recoveries suffered in those early times ought to be filed, not one of such ancient writs is to be met with. Thirdly, because had any objection been made at the time of the trial of the recovery on this account, the Court would and ought to have di-

Witham v. Lewis, 1 Wils. Rep. 48. 6 Brown Parl. Ca. 327.

rected the jury to find the execution of it from the exemplification itself, and the possession of the defendant and his ancestors, agreeable to it. And if so, it is difficult to give a reason why the courts of law should not draw the same legal conclusions, and make the like legal implication from facts themselves, which they would direct a jury upon their oaths to do. Fourthly, from the fatal consequences which might attend this judgment: for if this doctrine should be established, that the Judges ought not to presume execution at this distance of time, it might shake the titles of great part of the property of this kingdom, which probably may depend on the validity of ancient recoveries, suffered before the statute 34 Hen. VIII.; for if a jury should think proper to insist upon evidence to support such ancient recoveries, which, for the reasons above, appears impossible to be laid before them, as no attaint or other remedy against them would lie in such case, all property might be subjected to an arbitrary and perhaps corrupt determination of a jury, without any redress whatever. On the other side it was contended, that the judgment of the King's Bench should be affirmed, because it did not appear that any writ of seisin was ever awarded upon the common recovery suffered by Earl Thomas, or that the same was ever carried into execution by writ of seisin, or otherwise; for, until a writ of seisin is awarded, executed, and returned, (all which must appear upon record, and cannot be presumed) it is not a perfect recovery, and operates nothing; and no new estate is gained to the recoveror, nor any use raised thereby, nor is the former estate altered or changed. And it was so determined upon a question on this very recovery, so long ago as in the reign of King James I. And, as in the present case, no new

Sir W. Jones 10.

estate was gained to the recoveror, no new use raised, nor the old estate changed or altered by this recovery, Earl Thomas still continued tenant in tail. After hearing counsel in this cause, the following questions were proposed by the House to the Judges:

First, Whether sufficient matter was found in the special verdict, whereupon the common recovery of 5 Hen. VIII. can be adjudged or taken to be a complete valid recovery? And secondly, if not, whether, by law, a *venire facias de novo* ought to be awarded in this case? The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the Judges, that there was not sufficient matter found in the said special verdict, and that a *venire facias de novo* ought to be awarded. Whereupon the judgment of the King's Bench was affirmed *.

All the Proceedings in Recoveries may be enrolled.

52. By the statute 23 Eliz. c. 3. § 1. it is enacted, that every original writ of entry in the *post*, or other writ, whereupon any common recovery shall be suffered, the writs of *summoneas ad warrantizandum*, the returns of the said originals and writs of *summoneas ad warrantizandum*, and every warrant of attorney, as well of every demandant and tenant, as vouchee, extant and in being, may, upon the request or election of any person, be enrolled in rolls of parchment; and that the enrolment of the same, or of any part thereof, shall be of as good force and validity in law, to all intents and purposes, for so much of any of

* In a modern case Lord Kenyon says of this determination:—"Lord Derby's case has always been considered as a strange case; and the Judges of succeeding times have been astonished that no application was made to the Court of Common Pleas to rectify the defect in that recovery according to the usual practice of the Court." 5 Term Rep. 179.

them so enrolled, as the same being extant and remaining were or ought by law to be.

After 20 years the Deeds to make a Tenant to the Præcipe are sufficient Proof of a Recovery.

53. The proper evidence of a recovery is the exemplification of it; but there are many exemplifications of recoveries suffered between the commencement of the reign of Queen Anne and that of King George II., whereof no entries upon the rolls in the Treasury of the Court of Common Pleas, nor any writ of entry, summons, or seisin, can be found. Mr. Pigot having, in the course of his practice, discovered repeated instances of this neglect, procured the following statute to be passed, in order to prevent the inconveniences which might arise, in making out titles to lands, from omissions of this kind.

54. 14 Geo. II. c. 20. § 4. "Whereas by the default or neglect of persons employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights: for remedy thereof, be it further enacted by the authority aforesaid, that where any person or persons hath or have purchased, or shall purchase, for a valuable consideration, any estate or estates, in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are, or were necessary to be suffered in order to complete the title, such person and persons, and all claiming under him, her, or them, having been in possession of the purchased estate or estates from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or common recoveries, and declaring the uses of a recovery or recoveries,

and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record: Provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

TITLE XXXVI.

RECOVERY.

CHAP. IV.

In what Courts, and of what Things, a Recovery may be suffered.

1. *Court of Common Pleas.*
2. *Of the Counties of Lancaster and Durham.*
3. *Of the County of Chester and City.*
5. *Of Great Sessions in Wales.*
6. *Of Hustings in London.*
7. *Copyhold Courts.*
8. *Of what Things a Recovery may be suffered.*
9. *Rents.*
10. *Advowsons.*
13. *Tithes.*
14. *But not of a Fishery, &c.*
15. *By what Descriptions.*

SECTION 1.

Court of Common Pleas.

A COMMON recovery can in general only be suffered in the Court of Common Pleas at Westminster, because a real action cannot be commenced in any other court.

Of the Counties of Lancaster and Durham.

2. Common recoveries may, however, be suffered of lands lying in the counties palatine of Lancaster and Durham, in the respective courts of those counties, and not in the Court of Common Pleas at Westminster, because the King's ordinary writs do not run in those counties.

Of the County of Chester and City.

3. The county of Chester having been palatine ever since the Conquest, has always had courts of its own for the cognizance of pleas in all real actions, and common recoveries have been suffered in those courts.

By the stat. 34 & 35 Hen. VIII. c. 26. § 6. the Chief Justice of Chester is authorized to hold sessions twice in a year, in the shires of Denbigh, Flint, and Montgomery; and by § 40. of the same statute it is enacted, that every person suing a writ of entry in the *post* for any recovery, shall pay such fines for the same as is used in the King's Chancery.

4. By the statute 43 Eliz. c. 15. § 4. it is recited, that the mayor of the city of Chester had been time out of mind accustomed, in all common recoveries suffered before him, to award writs of *dedimus potestatem*, and to receive warrants of attorney from the tenants or vouchees in such recoveries.

Of Great Sessions in Wales.

5. By the statute 34 and 35 Hen. VIII. c. 36. § 40. it is enacted, that common recoveries may be suffered at the courts of great sessions in Wales, in like manner and form as in the Court of Common Pleas in England.

Of Hustings in London. 3 Rep. 57 *b.* Bohun's Priv. 241.

6. By the custom of London common recoveries may be suffered, upon writs of right, of lands lying within the precincts of the city of London, in the court of hustings.

Copyhold Courts.

7. By the custom of several manors in which there are copyholds, a recovery may be suffered in the copyhold or customary court of such manor, of the copyholds held thereof; of which an account will be given in the next title. Tit. 37. c. 2.

Of what Things a Recovery may be suffered.

8. A common recovery may be suffered of every kind of real property, whereof a writ of covenant may be brought, for the purpose of levying a fine; as of an honour, barony, manor, castle, messuage, land, meadow, pasture, underwood, heath, moor, &c.; and in general a common recovery may be suffered of any thing whereof a writ of entry *sur disseisin*, or any other writ of entry, will lie.

9. A common recovery may be suffered of an undivided part, as well as of the whole. And where a
Cro. Car. 110. person who was seised of a third part of a manor, suffered a recovery of a moiety of the manor, it was held good for a third part.

Rents.
Pigot, 97.
Vide infra, c. 10.
Turner v. Turner, 1 Bro. R. 316.

10. A common recovery may be suffered of a rent-charge issuing out of lands. And therefore if one grants a rent to A. in tail, remainder to B., a common recovery may be suffered of it. But of an annuity charged on personal estate, a common recovery cannot be suffered.

Advowsons.
ante, c. 2. § 8.
Recov. 97.

11. It was determined in Dormer's case, that a common recovery might be suffered of an advowson in gross, upon a writ of entry. Mr. Pigot says, this must be understood of an advowson appendant to a manor; but could not be of an advowson in gross, since the parson has the freehold; and that therefore it ought not to be by writ of entry *en le post*, but by writ of right of advowson.

12. A common recovery may however be suffered of an advowson in gross, and a small quantity of land, on a writ of entry *sur disseisin*.

Bayley v. Un. of Oxford, 2 Wils. R. 116.

13. Thus where the validity of a common recovery, which had been suffered of an advowson in gross and one acre of land, upon a writ of entry *sur disseisin*, was questioned, as to the advowson. Upon searching for precedents, sixteen were found where recoveries of advowsons in gross and a little land had been suffered, upon writs of entry *sur disseisin*; and no case found where such a recovery was ever held bad.

The Court refused to hear any argument against the recovery; but said, that if this were *res integra*, perhaps it might not be right; yet *quod fieri non debuit factum valet*. And gave judgment that the recovery was good.

Tithes, &c. Tit. 35. c. 6 § 8.

14. In consequence of the statute 32 Hen. VIII. c. 7. which has been already stated, a common recovery may now be suffered of every kind of ecclesiastical or spiritual profits, which are in the hands of lay persons; as of tithes, oblations, portions, pensions, &c.

Dormer's Case, ante, c. 2. § 8.

But not of a Fishery, &c. Pigot, 96. West Symb. 77 *b.* § 3. Touch. 41.

15. It is said by Pigot that a common recovery cannot be suffered of a fishery, common of pasture, estovers, services to be done; nor of a quarry, a mine, or a market; because these things are not in demesne, but in profit only.

By what Descriptions.

16. With respect to the descriptions which are necessary to be used of those things whereof a common recovery is suffered, they should be the same as in a *præcipe quod reddat,* in an adversary suit. But as recoveries have been long considered as common assurances, and conveyances by consent, great indulgence has been shown to them by the Judges.

Thinne v. Thinne, 1 Vent. 51. 1 Lev. 27.

17. Thus where a person who was seised of a manor and of two closes reputed part of the manor, suffered a common recovery of the manor with the appurtenances; and whether the recovery was a bar as to the two closes was the question. It was resolved by all the Court that the lands reputed parcel of the manor should pass; because it appeared by the deed of uses to have been the intent of the parties that they should pass; and because the constant practice and received opinion, since Sir Moyle Finch's case, had been, that lands reputed parcel should pass.

Tit. 35. c. 16. § 13.

Baker v. Johnson, Hut. 106.

18. A person being seised in tail, among other lands, of two marshes, called Knightsswick and Southwick, lying in an island called Camby, in the parish of Northfleet, suffered a recovery, in which South Benfleet and many other parishes were named, and also Camby, but the parish of North Benfleet was

omitted. And the question was, whether the lands in North Benfleet passed or not. The Court agreed, that the town and parish being omitted, though Camby was a *lieu connu*, yet being in a town, the recovery did not extend to it. That a recovery in a town, parish, or hamlet, is good; and perhaps in a place known out of a town, parish, or hamlet; but to admit a recovery of lands in a place known in a town, would be absurd, for there is no town in which there are not twenty places known.

2 Mod. 49. This case was denied to be law by Lord Chief Justice North, who said that it had been long disputed whether a fine of lands in *lieu connu* was good, but that in the time of King James I. the law was settled in that point that it was good; and for the same reason a recovery would be good, for they were both amicable suits, and common assurances, and as they grew more in practice, the Judges have extended them farther.

Lever v. Hosier, 2 Mod. 47. S. C. by the Name of Jones v. Wait, 1 Mod. 206.

19. Sir Samuel Jones being tenant in tail of lands in Shrewsbury and Cotton, which were within the liberties of Shrewsbury, suffered a common recovery of all his lands lying within the liberties of Shrewsbury; and the question was, whether the lands in Cotton, which was a distinct vill, though within the liberties, should pass. It was adjudged, that as the jury had found Cotton to be a vill within the liberties of Shrewsbury, the lands in Cotton should pass by the recovery.

Addison v. Otway, 1 Mod. 250. 2 Vent. 31. Freem. 241.

20. In ejectment a special verdict was found, that there was a parish of Rippon, and a vill of Rippon, but the latter was not co-extensive with the former: that a person who was tenant in tail of lands in the parish, but out of the vill, bargained and sold all his lands lying in the parish of Rippon, with a covenant to levy a fine and suffer a recovery to the uses of the

deed: that a common recovery was accordingly suffered of one hundred acres of land lying in Rippon: that the tenant in tail had no lands in the vill of Rippon, and that the intention of the parties was, that all the lands in the parish of Rippon should pass. It was argued, that the common law knows no such division of the kingdom as parishes, but only the division of vills; and therefore where a place is named in a record, and no more said, it is always intended a vill; consequently, that the recovery, if it passed any lands at all, could only pass those in the vill. But the Court were of opinion, that the recovery should extend to the lands in the parish of Rippon: 1st. Because otherwise the recovery would be void, it being found that the tenant in tail had no lands in the vill of Rippon. 2dly, Because it plainly appeared to be the intention of the parties that this should be intended the parish of Rippon, not because the jury had found it, (for the Judges said they would pay no attention to that), but because it appeared by the bargain and sale to be the intention of the parties that the recovery should extend to all the lands in the parish of Rippon, and not be confined to the lands in the vill of Rippon; for the bargain and sale and recovery were to be considered as one assurance. And although a place spoken of simply is in law intended a vill, and *stabitur presumptio donec probetur in contrarium*, yet here was sufficient proof of the intention of the parties.

21. In a writ of error from a judgment on *scire facias* in the Court of King's Bench in Ireland, brought to reverse four common recoveries in the Court of Common Pleas there, two of lands in the county of Limerick, and two of lands in the city of Limerick, Mr. Buller for the plaintiff in error objected, that

Massey v. Rice, Cowper, 346.

the several descriptions in all the four recoveries were bad. There were fourteen parcels in each recovery; and the principal objections to them were, 1st. As to the premises in the county, because some were demanded thus, "all those the castle, town, and lands of, &c. containing by estimation so many acres," without setting out the quality of the lands; that a recovery could not be suffered of a town, and that so many acres by estimation was uncertain. 2d. That others were described thus, "all that part of the town and lands, &c. now or late in the tenure of A. B." which was vague and uncertain. 3d. That two parcels were described as "containing a ploughland," which was also vague and uncertain. In respect of the premises in the city, he objected, that they were all demanded by the description of "messuage or tenement," which was uncertain, and also as being said to be "now or late in the tenure, &c." He insisted that a recovery has no effect until execution, therefore the description of the premises should be so certain that the sheriff may know how to execute it, and if bad in ejectment, *a fortiori* in a *præcipe*. Mr. Alleyne for the defendant in error, said, he should consider, 1st, What degree of precision was required by the register to the description of lands demanded in a *præcipe quod reddat*. 2dly, What indulgence was to be given to a common recovery, as a conveyance and common assurance. 3dly, Whether from the locality of these particular lands the descriptions were not sufficient. 1st, It was a general rule, that the form of the register must be followed; but there were cases that admitted of a deviation from it. The general principle upon which all forms were founded and upheld, was, that the defendant might know what he was to defend; and therefore whenever the term

used, either in respect of the quantity or the quality, was sufficiently certain and notorious to answer that purpose, it would be good, though not particularly named in the register. 2dly, Great favour was to be shown to common recoveries, because they were now a species of conveyance and common assurance of land. They were not like the cases cited, most of which were cases in ejectment, which are adversary suits, and where the objections arose in consequence of some essential defect, which was fatal. But a common recovery was in the nature of an amicable suit, which admitted of a greater latitude; and any description that would be good in a deed, would be good in a common recovery. 3dly, With regard to the local situation of lands in Ireland, it had always been understood that the Judges of Ireland knew the description of lands in that country better than the Judges here, and therefore credit ought to be given to their knowledge. It was expressly held in 2 Roll. Rep. 166. 1 Stra. 71. and 1 Burr. 623; which last case in principle answered all the objections that had been made. Another argument arose upon the statutes of jeofails, which was, that, being after verdict, they were now too late. As to the objections made to the particular descriptions of these lands—1st, The word "town" in Ireland did not mean, as it does here, houses inhabited, but was merely a technical description of a particular district, and is notorious there. 2dly, With respect to the uncertainty of "so many acres by estimation," it was sufficient if the general boundary was known; it was not necessary that the precise measure should be accurately and exactly ascertained: and as to the term "land," in legal acceptation it always meant arable. 3dly, The term "messuage or tenement" does not stand alone, but is

1 Rol. Rep. 165.

5 Rep. 40. Poph. 22.

accompanied with other words descriptive of its situation, which render it sufficiently certain for the sheriff to deliver possession; besides, it was the same description that was used in the deed of settlement by which the estate was entailed; therefore, even if the descriptions were more doubtful, the Court
2 Mod. 233. would make such a construction as would support them.

Lord Mansfield.—The consequences of those objections are so great; they are so void of the least glimmering of reason and common sense; and it would be attended with such vast inconveniences to the public in many cases, without a possibility of doing good in any, if in common recoveries, which are a species of conveyance and common assurance, such nice exceptions were to prevail; that the strictest proof of their being founded in law is necessary to induce the Court to overturn a recovery on such grounds. By the settled law of the land, men by deeds may fetter their estates; but tenant in tail when of age may unfetter them, observing a certain form. In this case there can be no doubt of the meaning of the tenant in tail, or his power, to unfetter the estate. The only question is, whether he has done it agreeable to the proper form; that is, whether he has described the premises with sufficient certainty. Now the description which he has used, is the identical description in the deed which created the fettering; and the objection which is made, is not so much that that description is uncertain; as that six or seven hundred years ago, in an adverse action, there was a doubt whether such an objection would not have lain; and therefore the defendant would make the same objection and raise the same doubt now. But a common recovery is not an adverse action. It is said that "all

that messuage or tenement with the appurtenances, situate in the lane between the two abbey-gates, now or late in occupation of J. C. his under-tenants or assigns, in the county of the city of Limerick," is too vague and uncertain. But one must look with a microscopic eye to discover, that a messuage or tenement, &c. is so uncertain a description, as that the sheriff, or any other person, could not know how to find the premises by it; and the objection can only be made by a person who pores over the syllables of the words.

The objections are of two sorts, and I have no doubt as to either. 1st, That the premises in the county are demanded thus: "all those the *castle, town,* and *lands,* containing by estimation, &c.;" which it is argued is uncertain both in respect of quality and quantity. As to that, it is admitted that "*castle*" is a good description in England. "*Town,*" was determined to be a good description in Cottingham v. King, 1 Burr. 623.; and "*land,*" means *arable* land. The next objection is, that the premises in the city are described thus: "all that messuage or tenement, with a garden or meadow thereto belonging, situate, &c. and now or late in the occupation of, &c." which it has been contended would be a bad description in ejectment. There are many cases in ejectment which have gone very far indeed; and therefore the doctrine of those cases ought not be extended. As to the authority in 3 Wils. 23, which would have great weight on account of its being so recent, the Judges in that case decided against their own private opinion and inclination, because they held themselves bound by authority. But there the words were only *messuage or tenement,* without any other description. Here there are other words, "with the appurtenances

and a garden, &c.;" which show that "messuage or tenement" are two words for the same thing, and that both mean a dwelling-house. But this is not any fundamental ground of determination in the present case. What I ground my opinion upon is, the principles laid down in Dormer's case, 5 Co. 40 *b.* reported also in Popham, 23; and the distinction the Court there take, between adverse actions and common recoveries; which at that time were become a common assurance and conveyance of lands, &c. and which the Court say, "being also made by assent between the parties, shall and always have had a different exposition from what is given to a recovery by pretence of title, or to the proceeding in any other real action, to which they are not to be compared; therefore a common recovery may be suffered of an advowson, common in gross, warren, and the like; and the intent of the parties shall be observed." Now the objection in this case is an objection to the very same description as is used by the ancestor in the deed which created the entail. The sole object of the recovery is to unfetter the premises so entailed; and therefore I will not depart from this anciently established principle to do such cruel injustice, both against the intention of the parties, and against public convenience. Not one precedent has been cited where such an objection has been held good in the case of a common recovery. But a case of a fine has been cited where it was allowed; and from thence it has been argued by analogy, that it is bad in a common recovery; but that argument does not hold. His Lordship then cited the case of Addison v. Otway, and said, this decision is an instance of liberality that would not have been adopted or followed in an adverse *præcipe*. So in many other instances; as an

ante, § 20.

advowson, for which no adverse action will lie, but a common recovery will: therefore, as the distinction between amicable and adverse suits exists—as the inconveniences of avoiding the recovery would be great—as no precedent in point is produced, and there is no possibility of doubt about the intent of the parties—I am clearly of opinion, that the judgment of the Court of King's Bench in Ireland ought to be affirmed. The other Judges concurred and the judgment was affirmed.

TITLE XXXVI.

RECOVERY.

CHAP. V.

Of the Parties to a Recovery.

1. *Who may suffer a Recovery.*
2. *Aliens.*
3. *Married Women.*
4. *Who are disabled from suffering Recoveries.*
5. *The King.*
6. *Persons attainted.*
7. *Infants.*
17. *Exception—Infant Trustees.*
19. *Idiots and Lunatics.*
21. *Tenants for Life.*
24. *Who may take by Recovery.*

SECTION 1.

Who may suffer a Recovery.

A COMMON recovery having from its origin been considered as a common assurance or conveyance, by which lands were transferred from one person to another; and the default and admission of judgment by the tenant and vouchee being as much their voluntary act as if they had conveyed the land by feoffment and livery, or any other act in *pais;* it was held, that all those whom the law enables, in other instances, to dispose of their property, and who are of full age and sufficient understanding, should have power to suffer a common recovery.

Aliens. ante, c. 2. § 12.

2. An alien may suffer a common recovery; for, as has been already stated, he has the freehold, and is a good tenant to the *præcipe* until office found.

Married Women. 4 Vin. Ab. 66.

3. Although a writ of entry might always have been brought against a husband and wife, yet it was formerly much doubted whether a married woman could be vouched with her husband, because she

ought to be examined, and the Court of Common Pleas had no warrant to examine her, and a married woman could not be examined without a writ.

It is, however, said in Mary Portington's case, that the usage had always been, upon a common recovery against husband and wife, to examine the wife, and to grant a *dedimus potestatem* to take her acknowledgement upon examination, as in the case of a fine. 10 Rep. 43*a*. Pigot says, that the examination of married women was wholly disused: this is however a mistake; for now, whenever a husband and wife appear in the Court of Common Pleas, to suffer a common recovery, the wife is always privately examined as to her consent. Where a warrant of attorney is acknowledged defore commissioners appointed by writ of *dedimus potestatem de attornato faciendo*, by a husband and wife, the commissioners are positively directed, by a rule of Court, which has been already stated, to examine the wife separately and apart from her husband, as to her free and voluntary consent to the suffering such recovery. And it is now settled, that a married woman is as fully bound by voucher in a common recovery as by a fine, and for the same reason. Recov. 66. ante, c. 3. § 15.

4. In enumerating the persons who are disabled from suffering common recoveries, I shall begin with those whose disability arises from the rules of the common law; and then proceed to those whose disability is created by act of parliament. Who are disabled from suffering Recoveries.

5. The King cannot suffer a common recovery; for if he does, he must either be tenant or vouchee; and in both cases the demandant must count against him, which the law does not allow. The King. Pigot, 74.

Persons attainted.

6. It is said in Jenkins, 251, if tenant in tail, the remainder in fee, is attainted of treason, a common recovery, in which he is tenant or vouchee, does not bar the remainder; for the estate tail vests in the King without office. If he dies, and the heir of his body is vouched, this also is no bar to the remainder; for the estate tail did not descend upon him, but was vested in the King before, without office.

Infants. 1 Inst. 380 *b.* 2 — 484. Dyer, 232 *b.*

7. Infants are not capable of suffering common recoveries, on account of their want of understanding; although if an infant is permitted to suffer a common recovery in person, he must, as in the case of a fine, and for the same reason, reverse it during his infancy, which must be tried by inspection of the Judges, otherwise the recovery will bind him for ever after.

Tit. 35. c. 5. § 36.

Hopton v. Johns, Cro. Eliz. 323. Ailet v. Walker, 2 Roll. Ab. 395.

8. There are, however, two cases in which it appears to have been determined that a common recovery suffered by an infant, who appeared in person, might be reversed. But, I presume, that these recoveries were avoided during the infancy of the vouchees; for the principle, that a recovery suffered by an infant, is so far similar to a fine, that it cannot be reversed after the infant comes of age, is most clearly stated by Lord Coke and Dyer, in the places above cited, and recognised in a case subsequent to those last mentioned; in which it was resolved, that where an infant suffered a recovery, and appeared in person, a writ of error did not lie after he attained his full age; and it is said, that the Court delivered this opinion after conference with the other Judges, it being a matter of great concern.

Raby v. Robinson, 1 Sid. 321.

9. But if an infant suffers a common recovery, in which he appears by attorney, he may reverse it at

c. 3. § 12.

any time after he attains his full age; as it may be tried by a jury whether he was an infant or not, when he appointed an attorney.

10. Thus, where a writ of error was brought to reverse a common recovery, and the error assigned was, that one of the vouchees was a feme covert, and under age, and that she appeared by attorney: Stokes v. Oliver, 5 Mod. 209.

It was determined, that the recovery should be reversed, although the woman had attained her full age, because it might be tried by a jury whether the warrant of attorney was made by a person under age or not.

11. It was formerly doubted whether a common recovery bound an infant who appeared by his guardian; and the practice therefore was, when an infant intended to suffer a common recovery, that he and his guardian should petition the King to grant letters under the privy seal to the Judges of the Court of Common Pleas, directing them to permit such infant to suffer a common recovery. But it was still in the discretion of the Judges to permit the infant to suffer it or not, according to the circumstances of the case; and if the Judges upon examination found it necessary, or that it would be advantageous to the infant that he should suffer a recovery, they then admitted persons of known integrity and fortune to appear as guardians to the infant, and to join with him in suffering a recovery in court. 10 Rep. 43 *a.* Cro. Eliz 471. Godb. 161. Life of Lord K. North, vol. i. 198. 8°.

12. The Earl of Devon devised his estates to his son the Earl of Newport, who was then an infant of the age of eighteen; and among the possessions of the said earl was the manor of Wansted, which he left to his son in tail, with reveral remainders over. The Earl of Devon was greatly in debt, and had appointed certain honourable persons to be guardians of his son, Blount's Case, Hob. 196. Jenk. Cent. 299. Sir J. Mackworth's Case, 1 Vern. 461. S. P. Cro. Car. 307.

Hesket v. Lee, 1 Mod. 48. 2 Saund. 94.

who found it necessary to sell the said manor of Wansted for payment of the earl's debts. They therefore petitioned the King that he would write to the Judges of the Common Pleas, that a common recovery should be suffered of this manor, which his Majesty did. And upon examination of the infant privately, and of his guardians in court, and of the circumstances of the case, a common recovery was accordingly suffered, in which the Earl of Newport and his guardians were vouched in person.

1 Ld. Raym. 113.

13. On the other hand, the Judges have refused to permit an infant to suffer a recovery by his guardians, where the reasons for the application did not appear to them sufficient.

Sir J. St. Alban's Case, Salk. 567.

14. Sir John St. Alban, being of the age of nineteen, his sister, who was next in remainder to him, and also his heir at law, married one of his footmen. He petitioned the King for leave to suffer a common recovery, who referred it to the Judges of the Common Pleas, before whom several precedents of recoveries, suffered by infants upon privy seals, were cited. The Judges observed, that seven of the petitions were by fathers upon the marriage of their sons, and an equal recompence given; whereas here was neither father nor marriage in the case. They said this case had been carried too far already, and therefore would not allow it.

15. Common recoveries suffered by privy seal are now disused, and private acts of parliament are universally substituted in their stead.

Tit. 32. c. 4.

16. If an infant is permitted to suffer a common recovery, he must make a tenant to the *præcipe* by feoffment, and give livery of seisin in person, by which means the feoffment is only voidable; whereas, if the infant appointed an attorney to give livery

of seisin for him, the feoffment would then be absolutely void.

17. An infant trustee may join in a common recovery, under the statute 7 Ann. c. 19., if he is directed so to do by the Court of Chancery. Exception, Infant Trustees. Tit. 35. c. 5. § 44.

18. Thus, where a person who was a trustee, devised all his estates to his son, who was then an infant, in tail, with remainders over; a petition was preferred, that the infant to whom the trust estate was devised might be ordered to convey by recovery, pursuant to the statute 7 Ann. c. 19. Lord Hardwicke at first thought there must be an application for a privy seal, but the act being general, "that the infant shall convey lands, as the Court, by order, shall direct;" his Lordship made an order, that the infant should convey by a common recovery. Ex parte Johnson, 3 Atk. 559.

19. Idiots, lunatics, and generally all persons of weak understanding, are disabled from suffering recoveries, as well as from levying fines; though if an idiot or lunatic does suffer a common recovery, in which he appears in person, no averment can afterwards be made that he was an idiot or lunatic, for the same reason that such an averment is not admissible against a fine. But if an idiot or lunatic is vouched by attorney, I presume such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney acknowledged by an infant for the purpose of suffering a common recovery; as the fact of idiocy may be tried by a jury as well as that of infancy. Idiots and Lunatics. Tit. 35. c. 5. § 47.

20. Evidence of weakness of understanding has been admitted to invalidate a deed to make a tenant to the *præcipe* for suffering a common recovery. Wentworth's Case, infra, c. 11.

Tenants for Life. Pigot, 18. 10 Rep. 43 *b.*

21. By the common law, if a *præcipe* had been brought against a tenant for life, and a recovery suffered, it would have barred the persons in remainder; but this being justly considered as a grievance, it is enacted by the stat. 32 Hen. VIII. c. 31. that all common recoveries suffered by tenants for life, without the consent of the persons in remainder or reversion, shall be totally void.

Pigot, 83.

22. If after this act, a tenant for life had made a lease for years, and the lessee had made a feoffment, and a *præcipe* had been brought against the feoffee, and he had vouched the tenant for life; such a recovery was not within the statute, because the tenant for life was not then seised of the estate for life. To remedy this, the statute 14 Eliz. c. 8. was passed, reciting that several tenants in tail, after possibility, and other tenants for life or lives, had suffered common recoveries, to the prejudice of those in remainder or reversion:

It was therefore enacted, that all such recoveries had or prosecuted by covin, against any such particular tenant, or against any other, with voucher over of such particular tenant, shall, as against all persons in remainder or reversion, be utterly void and of no effect. Provided that that act shall not extend to recoveries by good title, or to recoveries by assent and agreement of the persons in remainder or reversion, so that such assent appeared of record in any of her Majesty's courts.

infra, c. 7.

Wiseman v. Crow, Cro.Eliz.562. Jenning's Case, infra, c. 7.

23. In consequence of the last proviso in this statute, a tenant for life may join with the persons in remainder or reversion in suffering a common recovery, without incurring a forfeiture.

Who may take by Recovery.

24. With respect to the persons who are capable of taking an estate by a common recovery, as any

person may sue out a writ of entry, it follows, that any person may be demandant in a common recovery; and the uses of a recovery may also be declared to any one capable of taking lands by way of grant, such as infants, married women, corporations sole or aggregate, or any other persons, not considered in law as civilly dead.

TITLE XXXVI.

RECOVERY.

CHAP. VI.

Of the Amendment of Recoveries.

2. *Writ of Entry.*
3. *Names of the Parties.*
10. *Description of the Estates.*
18. *Judgment.*
20. *Writ of Seisin.*
22. *There must be something to amend by.*

SECTION 1.

COMMON recoveries being judicial proceedings must be carried on according to the established forms and solemnities of a suit at law; but as they are suffered with the consent of all the parties, and considered as common assurances, the Court of Common Pleas has in many cases allowed them to be amended, on the same ground as that on which fines are amended.

Tit. 35. c. 7.

Writ of Entry.

2. A mistake in the writ of entry, on which a common recovery was suffered, was, in a modern case, allowed to be amended, by inserting 50 acres intead of 30. Lord Ch. J. Eyre doubted whether the Court had power to do it, in consequence of the determination in Lord Pembroke's case; but Mr. Justice Rooke observed, that by the stat. 8 Hen. VI. c. 12. original writs might be amended, as to mistakes of the clerks.

Cross v. Grey, 1 Bos. & Pull. 137.

Tit. 35. c. 7.

3. Where an evident mistake appears in the names or description of the parties, the Court has allowed it to be amended. Names of the Parties.

4. A common recovery was suffered in a writ of entry in the *post* against Elizabeth Pinde, and in the warrant of attorney she was called Alicia: the warrant was allowed to be amended. Pinde v. Norton, Dyer, 105.

5. A common recovery was agreed to be suffered, wherein John Chapman and Richard Elton were to be demandants. By the mistake of a clerk, the writ of entry was sued out in the names of John Chapman and John Elton. The recovery was allowed to be amended. Chapman v. Bacon, Pigot, 170.

6. A warrant of attorney was given, in order to suffer a common recovery, by William Reynolds and Hester his wife. The serjeant who took the warrant of attorney certified the same to be given by William Reynolds and Margaret his wife: and the *mittimus* and transcript were made of a warrant given by Margaret, and the recovery was entered accordingly. It was allowed to be amended. Idem.

7. A common recovery was suffered by R. Callow *et ux'*, without mentioning the name of the wife, and it was allowed to be amended. Thurban v. Pantry, Pigot, 171.

8. A recovery was allowed to be amended, by changing the words Ann the wife of Henry Goodwin to Elizabeth, in conformity to a fine and deed to lead the uses of it. Mayre v. Coulthard, 2 Black. Rep. 1230.

9. A rule was made absolute to amend a common recovery, by transposing the names of the demandant and tenant, pursuant to the deed making a tenant to the *præcipe* for the recovery. Biscoe had been demandant, and Lord tenant; but, by the deed, Lord was to be the demandant, and Biscoe the tenant. Lord v. Biscoe, Barnes, 24.

Description of the Estates.

10. In the same manner, where a mistake appears to have been made in the description of the estates intended to be comprehended in a recovery, it has been allowed to be amended.

Skinner v. Laud, Pigot, 171.

11. A common recovery was agreed to be suffered of lands in *Alphampton* and Magna Hermney, in the county of Essex; but by mistake the same was suffered of lands in Alphampton and Lamarsh. It was ordered to be amended.

Whitwell v. Masters, Pigot, 172.

12. A common recovery was agreed to be suffered of lands in New Church, Levington, and Mersham, but New Church was totally omitted. Upon examining the deed to lead the uses, it was ordered to be amended.

Brook v. Biddolph, Pigot, 172. 1 Taunt. 484.

13. A common recovery was agreed to be suffered of two messuages and one garden in London; but being only suffered of one messuage, it was allowed to be amended.

Jenkinson v. Staples, Pract. Reg. C. P.

14. The *præcipe* and writ of entry in a common recovery were allowed to be amended, by adding the names of several parishes which had been omitted.

Henzell v. Lodge, 2 Black R. 747. 3 Wils. R. 154. Wheeler v. Heseltine, 2 Bos. & Pul. 560. Milbank v. Joliffe, Id. 580.

15. The deed to lead the uses of a recovery, mentioned "all the vouchee's lands in Aldenham, or elsewhere, in the county of Kent, in the occupation of Robert Goddard." Robert Goddard rented one entire farm of the vouchee (all sworn to be intended to pass by the recovery), being principally in the parish of Aldenham, but part thereof lay in the parish of Mersham, which was not known to the parties when the recovery was suffered. The Court, after taking a day to consider of it, allowed the recovery to be amended, by inserting the word Mersham.

Watson v. Cox, 2 Black. R. 1065.

16. On a motion to amend the recovery of lands, &c. in the town of Kingston-upon-Hull, by inserting the words *in Myton*, and the words, *and county*,

thereby making the description of the lands to be "in Myton, in the town and county of Kingston-upon-Hull." The deed to lead the uses described the parcels to be situate "in the lordship of Myton, in the county of York, or in the town and county of Hull, lately purchased of Thomas Yates." And it was proved by affidavit, that one William Crowle purchased of Thomas Yates the lands intended to pass, being in the township of Myton, in the town and county of Kingston-upon-Hull, and, in 1728, settled them successively on George and Richard Crowle in tail: that George died without issue, and Richard, being then tenant in tail, and having no other lands in Kingston-upon-Hull, did, in 1754, suffer this recovery. The Court directed notice to be given to the tenant, and, on his consenting, made the rule absolute.

17. A recovery, which had been suffered nine years before, was ordered to be amended, by putting the word Trul, the name of a vill, into its proper place, according to the deed of uses. Trul had been by mistake put into the recovery as an advowson, not as a vill where land lay. It was objected against this amendment, 1st, That the estate was in trustees at the time of the recovery, and, consequently, the trustees not being parties, there was no good tenant to the *præcipe*. 2dly, That the lands were customary tenure. 3dly, That the parties who suffered the recovery were volunteers. 4thly, That the wife of Pullen, the vouchee, was dead, and a recovery could not then be suffered to bar the remainders. The Court said, they would not enter into the question, whether in equity recoveries of trust estates would bar legal remainders, or into the other objections. When the recovery was amended,

Loggin and Pullen, Barnes, 21.

valeat quantum valere potest; the intention of the parties was the foundation for the amendment. The transaction appeared to be fair, and without fraud or collusion. The principle upon which they went, was the statute 8 Hen. VI., to amend the misprison of the clerk. A *præcipe* was the cursitor's instruction for an original writ; a deed of uses was the clerk's instruction for a recovery. The *præcipe* and deed were the things to amend by; and Mrs. Pullen being dead, an amendment was the only remedy left.

Dowse v Reeve, 2 Bos. & Pull. 578. 1 Taunt. 257. Id. 355.

Judgment.

18. Where there has been a mistake of the clerk in the words of the judgment, the Court has ordered it to be amended.

Barnes, 20. 22.

19. Thus, there are two instances where, upon motion to amend a recovery, by striking out the words, *it is adjudged*, and inserting the words, *it is considered*, the Court has ordered it to be done; because such an amendment related to the act of the Court in giving judgment.

Writ of Seisin.

20. Amendments have also been allowed in the writ of seisin, and the return thereof.

Wilton v. Fairfax, Barnes, 23. Watson v. Lockley, 2 Wils. R. 2.

21. Thus, where a writ of seisin was rightly directed to the sheriffs of the city of York, but not returned in the name of any sheriff; though a mistaken return in the singular, instead of the plural number, was endorsed on the writ; the prayer of seisin and return of the writ were ordered to be first amended, and the roll and exemplification accordingly.

There must be something to amend by.

22. No amendment, however, is allowed in a common recovery, unless where there appears an evident mistake or misprision of the clerk, or where there is something to amend by.

ante, c. 3. § 38. Barnes, 17.

23. Thus, in the case of Wynne and Wynne, an application was made to the Court of Common Pleas,

to amend the *teste* and return of the writ of entry, and a rule to show cause. The Court, after hearing counsel on both sides, and consideration, was of opinion that all amendments must be consistent with the rules of law, and there must be something to amend by. In this case the vouchees by law could not appear until the return day of the writ of summons, and the power of attorney given by Alithea to appear on that day was revoked by her death in the intermediate time. By the statute 8 Hen. VI. original writs are amendable if wrong by misprision of the clerk, or where there is any thing to amend by. Here was no misprision of the clerk, the writ was made agreeable to his instructions, and there was nothing to amend by; the amendment prayed was to amend in the first instance. The rule was discharged.

24. Thus, where a motion was made to amend a recovery, by striking out the city of Litchfield, and inserting the county of Stafford, with other consequential amendments, wheresoever the names of the county and sheriff occurred, and also by inserting Longden (the name of a vill) after Abnall, another vill named in the recovery; the Court observed, that it was a gross mistake in the attorney concerned, in suing out only one recovery instead of two; and that they would willingly give the parties all the assistance they legally could to effect their evident intent, but it was beyond their power. In the cases of amendments which had been cited, the party had no estate in the vill or county struck out; therefore, *quoad hoc*, the recovery had no operation; but the present application was, to annul a valid recovery in the city of Litchfield, which had operated upon lands therein for near forty years, and to substitute

Acton v. Baldwin, 2 Black. R. 874.

in its stead a recovery in the county of Stafford. The motion was refused.

Pearson v. Pearson, 1 H. Black. R. 73.

25. In a recovery, a farm called Thiefside, otherwise Thievishead, was described to be situated in the forest of Inglewood, in the parishes of Heskit in the Forest and St. Mary's Carlisle, or one of them, in the county of Cumberland. It was afterwards discovered that the whole of the said farm was not within the parishes of Heskit in the Forest and St. Mary's Carlisle, as described in the recovery; but that part of it was in the parish of Lazonby, in the county of Cumberland. It was moved to amend the recovery, by inserting the word "the parish of Lazonby," on an affidavit of the owner of the lands, the vouchee, stating as above, and that he meant to include all his estates in the county of Cumberland in the recovery, and that he did not know, when he suffered the recovery, that any part of the said farm was in the parish of Lazonby. The Court would not, on this affidavit alone, grant leave to amend; but upon reading the deed to lead the uses, there was found the following clause: "And all other the estates, manors, or lordships, messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in the county of Cumberland." This was holden by the Court sufficient to warrant an amendment, as it appeared on the face of the deed itself. And the rule for amendment was made absolute.

Suncox, &c. 4 Taunt. 155. Id. 226. Kenderly, &c. Id. 738. Dawney, &c. Id. 798.

TITLE XXXVI.

RECOVERY.

CHAP. VII.

Effect of a Recovery in barring Estates Tail, Remainders, and Reversions.

1. *Ancient Modes of barring Estates Tail.*
12. *A Recovery bars an Estate Tail.*
30. *And all Remainders and Reversions.*
41. *And an Entail of a Rent-charge.*
44. *Effect of Recoveries with single and double Voucher.*
60. *The Power of suffering a Recovery cannot be restrained.*
65. *An Heir in Tail allowed to inspect Title Deeds.*

SECTION 1.

Ancient Modes of barring Estates Tail. Tit. 2. c. 2. § 44.

THE variety of inconveniences which were produced by the statute *De donis conditionalibus*, and the impossibility of obtaining a parliamentary repeal of it, induced the Judges to adopt every possible means of evading and invalidating its effect; but the progress was gradual, and it was a long time before it was completely effected.

2. The first rule which the Judges adopted on this subject was, that the issue in tail could not avoid the alienation of his ancestor, provided he was left a recompence in value for the estate tail which he had alienated. Thus it was determined very soon after the statute *De donis*, that if a tenant in tail lost his estate tail and recovered over in value, such recovery in value was a good bar to the estate tail; because the issue had a recompence.

10 Rep. 37 *b.* 2 Comm. 303.

Vide Tit. 32. c. 24. § 42. Lit. § 712. 749. 1 Inst. 393 *b.* 10 Rep. 37 *b.*

3. It was resolved upon the same principle, that a lineal warranty with assets was a good bar to the issue in tail. However Lord Coke observes, that if a tenant in tail aliened with warranty, leaving assets to descend, and the issue in tail aliened the assets and died, the issue of that issue should recover the estate tail; because the lineal warranty descended to him without assets: which shows that the issue in tail could not be barred, unless he had a full recompence in value.

4. The rule that the issue in tail could not avoid the alienation of his ancestor, provided he had a recompence in value, was still farther extended, by a decision of the Judges in 44 Edw. III., by which it was determined, that if a tenant in tail granted a rent-charge, in consideration of a release of right, to a person who had a prior claim to the estate, such a grant should bind the issue in tail; because it was made for his benefit, and the estate tail descended to him as a recompence for the grant.

Octavian Lumbard's Case, 44 Ed. III. Year Book, 21.

5. Thus, where a person brought a replevin for taking his cattle, the defendant avowed, for that one Nicholas was seised in tail of the manor of B., and had issue John and Joan; Nicholas died, John being then in Ireland; Joan, the daughter, entered and died seised, leaving issue a son named Nicholas, who entered; John, the son, having returned from Ireland, sued for the land, but agreed to release all his right to the estate tail to his nephew Nicholas in consideration of a grant from Nicholas of a rent of 20*l.* *per annum*, with power of distress. This rent being afterwards in arrear, a distress and avowry were made on the lands charged, which were then in the possession of the issue of Nicholas. The Court was of opinion, that as Nicholas, who was tenant in tail,

granted this rent in consideration of a release of right from John, who was really entitled to the estate tail, the grant was good, and sufficient to bind his issue in tail, because the estate tail descended to them as a recompence for this rent.

6. In the preceding modes of barring estates tail it may be observed, that the recompence in value which descended to the issue in tail was real. But in 12 Edw. IV. a case arose in which the Judges carried this principle to a much greater length; and determined that a nominal and fictitious recompence descending to the issue in tail, should be an effectual bar, not only to the issue in tail, but also to the persons entitled to the remainders and reversion. And as the validity of recoveries, even at this day, depends upon the authority and principles laid down in that case, it will be proper to state it fully.

7. I. B. being seised in fee of the lands in question, gave them to one William Smith, to hold to him and the heirs of his body, by force of which he was seised. William Smith died, leaving Humphrey his eldest son, on whom those lands descended, who entered and was seised *per formam doni*. Humphrey enfeoffed one Tregos of the said lands in fee, who rendered them to the said Humphrey and Jane his wife, and to the heirs of their two bodies, remainder in fee to the said Humphrey, by force of which they were seised. Some time afterwards Jane died, on which Humphrey became sole seised of the said lands in tail; and being thus seised, one Taltarum brought a writ of right against Humphrey, and counted of his possession against him. Humphrey made defence, and vouched to warranty one R. King, who entered into the warranty, and joined the mise on the mere right; afterwards R. King, the vouchee, made default,

Taltarum's Case, 12 Edw. IV. Year Book, 14. 19.

Vid. 13 Ed. I. No. 1. p. 1. Bro. Ab. tit. Recovery in Value, 19.

and departed in contempt of the Court; in consequence of which final judgment was given, that the demandant Taltarum should recover the lands in question against Humphrey, and that Humphrey should recover lands of equal value of R. King, the vouchee. Humphrey afterwards died, without leaving heirs of his body; and the question was, whether Richard the brother of Humphrey, who was heir in tail to those lands, should be barred by this recovery? It was determined by all the Judges, that the estate tail was not barred by this recovery, because the tenant in tail was not seised of the estate tail at the time of the recovery, but of another estate; and as the recovery in value goes according to the estate whereof the tenant was seised at the time of the recovery, and not in recompence of the estate he had not, the issue in tail could have no recompence in this case, and therefore was not barred by the recovery.

Pigot, 9. It is observable, that this case was conducted with a good deal of art; for at first sight the decision seems to be against the validity of a common recovery in barring estates tail, but from the arguments of the Judges it appeared they were all of opinion that if the tenant in tail had been actually seised of the estate tail at the time of the recovery, the recompence in value would then have descended in lieu of the estate tail, and therefore the issue in tail would have been barred.

8. All the writers on our law have dated the æra of common recoveries from this decision, although the preceding cases show, that so early as the reign of Edward III. the Judges were extremely well inclined to give tenants in tail every assistance for enabling them to unfetter their estates.

9. It is evident from this case, that the reason on which the Judges grounded their original determination, that a common recovery was a good bar to an estate tail, was, because the issue in tail had a recompence in value, either real or fictitious, for the estate tail which was recovered; but as several cases arose in which the recompence in value could not possibly extend to all the estates which were barred, the Judges have at different times exerted their ingenuity in inventing other reasons to support the validity of common recoveries. Thus, in the case of Hudson v. Benson, in Mich. 23 Car. II., Lord Chief Justice Hale is reported to have said: "The recompence of the value is the reason of the bar by common recoveries, as to the issue in tail, but not the reason why it bars as to him in remainder or reversion. But the reason in this case is, because the recoveror, in supposition of law, is in of the estate tail, and that in judgment of law has still continuance; as at common law, the donee, *post prolem suscitatam*, might have aliened and barred the donor; and a common recovery is, as it were, a conveyance excepted out of the statute *De donis*, and the recoveror is in of the estate which the donee had; but the issue in tail is barred to claim it, in respect of a supposed recompence by the recovery." 2 Lev. 29. Freem. 363.

10. In Mr. Ratcliffe's case, which was argued before the Lords Delegates, 6 Geo. I. Mr. Baron Mountague observes, that the words of Sir M. Hale respecting recoveries had been cited, and said, "I never found my opinion on the dictums of reporters, in which they are very apt to mistake the words and sense of the Judges from whom they take them; and so it seems to be in that case. Lord Hale is there reported to have said, that the recompence 1 Stra. 289.

in value is not the reason why common recoveries are bars to the remainder-men, but because those are conveyances excepted out of the statute *De donis.* But it is the text of Litt. § 668. that if tenant in tail suffered a feigned recovery, the issue might falsify it in a *formedon.* This shows that at common law such recoveries as we now make use of to bar estates were not known; and therefore it would have been ridiculous in the statute *De donis* to have excepted recoveries, since common recoveries were not used; and recoveries on good title could not be imagined to be included. If issue was taken on the disseisin alleged in the writ of entry, and found for the demandant, and so the recovery on a point tried, this at common law would bar the issue, there lying an attaint against the jury; though where it was by default it would not. But afterwards another middle way was found out and favoured by the Judges, to prevent the inconvenience of perpetuities; and that was, where the tenant in tail appeared and vouched over, and the vouchee made default, and so there was a judgment for a recompence to one, and for the lands demanded to the other, This judgment, though by default, and without issue tried, was held a bar, on account of the recompence in value."

Salk. 563.

11. It is extremely clear, from what has been premised, that the effect and validity of common recoveries cannot be supported by any of the maxims or principles of the common law, but that they are a *fictio juris*, adopted for the purpose of destroying that species of perpetuity which was created by the statute *De donis*; and the numerous advantages which arose from the decision of the court in 12 Edw. IV. was a sufficient justification of it. Besides, common recoveries have now continued so

long, and their utility is so fully understood, that the determination of the Judges in Taltarum's case, so far from being considered as an unwarrantable stretch of their authority, must on the contrary be acknowledged to have been a measure of great public utility, and from which this country has derived infinite advantage.

Law of Forfeit. 83. 1 Black. R. 254. 1 Burr. 115. Vide Willes Rep. 449.

12. But whatever were the reasons on which the validity of common recoveries was originally founded, it may now be laid down as a certain maxim or rule of law, which has prevailed for several centuries, that a common recovery is an assurance whereby all tenants in tail are enabled to bar their estates tail, and convert them into estates in fee. And in Mary Portington's case, 11 Ja. I. it was determined, that a judgment given against tenant in tail, upon a voucher and recompence in value, would bind the estate tail, notwithstanding the statute *De donis conditionalibus*; whether the recovery was upon good title or not. And that the judgment given in such a case for the tenant in tail to have in value, would bind the estate tail, although no recompence was had.*

A Recovery bars an Estate Tail.

10 Rep. 37 *b.*

* The following passage shows how strongly the Judges have always supported common recoveries. "At the Parliament held in the reign of the late Queen Elizabeth, in the great case between J. Vernon and Sir Edward Herbert, which was argued by learned counsel before the Lords in Parliament; there Hoord, an utter barrister of counsel, with Vernon (who was barred by a common recovery) rashly and with great ill will inveighed against common recoveries, not knowing the reason and foundation of them; who was with great gravity and some sharpness reproved by Sir James Dyer, then Chief Justice of the Common Pleas, who said he was not worthy to be of the profession of the law, who durst speak against common recoveries, which were the sinews of assurances of inheritances, and founded upon great reason and authority." 10 Rep. 40 *a.*

13. A common recovery is a good bar to the issue in tail, though the tenant in tail dies before the recovery is executed.

ante, c. 3. § 34. 1 Inst. 361 *b.* Dyer, 35. pl. 28.

14. Thus, in Shelley's case, where a tenant in tail suffered a common recovery, and died on the same day, before the Court had awarded a writ of *habere facias seisinam*, it being doubted whether execution might be sued against the issue in tail, the majority of the Judges were of opinion that it might; for the right of the estate tail was bound by the judgment, and not by the execution. But if a recovery be had against a tenant in tail upon a false judgment, who dies before execution, in a *scire facias* against the issue in tail, he may avoid it.

1 Inst. 349 *b.* 3 Rep. 3 *a.* 10 — 38 *a.* Tit. 2. c. 2. § 13.

15. An erroneous recovery, suffered by a tenant in tail, will bar his issue, as long as it continues in force.

Machill v. Clerk, Com. Rep. 119. Salk. 619.

16. It has been stated, that where a tenant in tail covenants to stand seised to the use of himself for life, remainder to his eldest son in tail, it is absolutely void, and does not alter the estate. And it was held, that after such a covenant, the tenant in tail might suffer a common recovery to other uses, which would be good.

ante, c. 5. § 22.

17. It has been stated, that by the stat. 14 Eliz. c. 8. recoveries suffered by tenants for life are made void. But there is a proviso in that act, declaring that it shall not extend to recoveries by assent and agreement of the persons in remainder or reversion; so that such assent appeared of record in any of her Majesty's Courts.

Jennings' Case, 10 Rep. 43.

18. A. being tenant for life, with remainder to her son in tail, a *præcipe* was brought against A., who vouched the son, who vouched over the common vouchee, by which means a common recovery was suffered. All the Judges were of opinion that the re-

covery was good, and within the proviso in the statute 14 Eliz. c. 8.

19. If a *præcipe* is brought against a tenant in tail, and his wife, where the husband is sole seised, and his wife has nothing, and they both vouch over in the usual manner, it will bar the estate tail.

20. Thus, where John Trevilian, being tenant in tail, suffered a common recovery, in which he and his wife vouched over the common vouchee. It was objected, that the recovery was not effectual to bar the estate tail, because the wife was named in the *præcipe* as joint tenant with her husband, and appeared and vouched as joint tenant; and the vouchee entered into the warranty, admitting that he ought to warrant to them, whereby he also admitted that the wife had an estate in the tenancy, and had cause to vouch; and as she ought to have the recompence in value by conclusion, there was therefore no reason why the issue in tail should be barred; for the reason that an estate tail is allowed to be barred by a common recovery is, on account of the recompence in value, which is, or by possibility may be rendered; and if the wife was entitled to the recompence in value, and not the issue in tail, then there was no reason why the issue should be barred. But the Judges were unanimously of opinion, that in this case the estate tail was barred, for it was expressly found by the verdict, that the wife had nothing in the tenements at the time of the recovery, but that the husband was sole seised in tail; and as he alone lost the tenancy, the recompence should go to him, and should be of the like estate with that he had lost.

Eare v Snow, Plowd. 514. 18 Vin. Ab. 214.

21. It was formerly held, that where a *præcipe* was brought against a tenant for life and the re-

mainder-man, such a recovery would not bar the estate tail.

Leech v. Cole, Cro. El. 670. 2 Roll's Abr. 495. 3 Rep. 6 *b.*

22. Thus, where a person was tenant for life, with remainder to his eldest son in tail, and a *præcipe* was brought against the father and son jointly, who vouched over the common vouchee. It was held by three Judges against one, that the estate tail of the son was not barred by the recovery; for the lands recovered in value must go in the same manner in which the estate that was lost would have gone; whereas, in the present case, there being a joint *præcipe* brought against the tenant for life and the person in remainder, they must be supposed to be joint tenants, and the judgment must be accordingly; that as the reason why a recovery bars an estate tail is on account of the recovery in value, and as it cannot be averred that the lands recovered in value shall go in any other manner than that which is stated in the record, it follows, that the issue in tail can have no recompence.

Pa. 37.

23. Mr. Pigot observes, that these reasons savour of a wonderful subtilty; and although no man would venture to suffer a recovery in this manner, yet if a question of this kind were now agitated, these distinctions would not be so easily admitted, since the courts of law adopt every mode of supporting common recoveries, as assurances generally used, for the conveyance of estates. And in the following case the Court of King's Bench was of opinion, that a recovery of this kind would bar an estate tail.

Page v. Hayward, Pigot, 176. 2 Salk. 570. Rep. temp. Holt, 618.

24. A tenant in tail and the person in remainder joined in making a tenant to the *præcipe*, who vouched them jointly, and they in the same manner vouched over the common vouchee. It was

objected, that as the voucher was joint, the recovery in value must be joint, and so the tenant in tail and the person in remainder must recover moieties in value; whereas the whole was recovered against the tenant in tail, and consequently, to bind the issue, he ought to recover in value the whole; so that the recovery in value not being proportionable to the loss, it was void. Lord Chief Justice Holt delivered the opinion of the Court. As to the validity of the recovery in baring the estate tail, he observed, that if a *præcipe* was brought against a tenant in tail in possession and a stranger in an adversary action, and a recovery was had, it would be good: for when a *præcipe* was brought against several persons, it was not necessary that they all should be tenants of the freehold, for if any one of them had the freehold, it would be sufficient. And if the bringing a *præcipe* against a tenant in tail and a stranger would not vitiate a recovery, neither would a joint voucher; for when the vouchee comes in and enters into the warranty, he is as much tenant in law to the writ, as if the *præcipe* had been originally brought against him; and so the case of a stranger being vouched jointly with the person who is seised of the estate, did not differ from the case of a stranger being made tenant to the writ jointly with the person who had the freehold. If a tenant in tail conveyed the freehold to a third person, against whom a *præcipe* was brought, and he vouched a stranger, who vouched the tenant in tail, and the tenant in tail entered into the warranty, and vouched over the common vouchee; this would be a good recovery; for in an adversary action, if the tenant to the *præcipe* vouched a stranger who never had any estate in the land, there was no remedy for it; the demandant could not counterplead the voucher, until

the statute of Westminst. 1. c. 40., which was productive of great inconvenience, for when a *præcipe* was brought against the tenant of the land, he might vouch a stranger, and that stranger might vouch another stranger, and so on *in infinitum*; and therefore the statute gave the counterplea, that neither the vouchee, nor any of his ancestors were ever seised of the lands in question, by which they might have enfeoffed the tenant or his ancestors; but with this exception, unless the warrantor were present, and would *gratis* enter into the warranty. If a stranger be a good vouchee, he becomes a good tenant to the writ, and a release to him by the demandant after he has entered into the warranty is good, and the vouchee may plead it after the last continuance, for it is as valid as if it had been made to the tenant himself. Nor is it material whether there was any real warranty between the tenant and the vouchee when it is once admitted upon record, for it is then the same as if there really had been a warranty. The principal difficulty in the case was, because the recovery in value was not proportionable to the loss, for by the joint voucher the recovery in value must be joint, whereas the vouchees were tenants in tail of the whole, the one in possession, the other in remainder; and this would be a great objection, if the case were considered upon the foot of the estoppel, for the tenant in tail will be estopped during his life from claiming more than a moiety of the recompence in value, but after his death the issue in tail will not be estopped, but may say that the tenant in tail in remainder had no estate in possession in the land, so the recompence in value will go to him only. And there is no difference between this case and that of Eare v. Snow, in Plowden, 514, where the husband was tenant in tail of lands, and a *præcipe*

ante, § 20.

being brought against him and his wife, they vouched over the common vouchee, and the recovery was held to be good; though it was objected that the recompence in value, which was the cause of the bar, should, if the wife survived, go to her, and therefore the issue in tail was not barred. But it was held, that the issue in tail should not be bound by any estoppel which his father admitted, by joining in the voucher with his wife, but might say that his father was sole tenant in tail, and the wife had lost nothing; and he being the person who had lost the whole, should have the whole recompence.

There was a case in Trin. 1657, Rot. 179 or 180, between Murrell and Osborn (of which his Lordship said he had a report in the hand-writing of Lord Chief Justice Bridgman) where, in a formedon, the tenant in tail pleaded in bar a common recovery on a *præcipe* against the grantee of tenant in tail, in which the tenant in tail and a stranger were jointly vouched, and vouched over the common vouchee; and it was resolved that the recovery was good. And there was also a case 23 Hen. VIII. Brooke's Ab. tit. Recoveries in Value, 27, where a woman was tenant in tail, and a *præcipe* being brought against her and her husband, they vouched over the common vouchee; and the recovery was held good, though the husband survived, because the recompence went in the same manner as the land recovered would have gone. This case was full in point, for the husband was as much a stranger to the wife's estate tail as any other person; and so in Eare and Snow was the wife to the husband; the only difference being, that in the case in Brooke the husband must have been named, whereas in that of Eare and Snow the wife need not. His Lordship concluded

Doe v. Nelson, 2 Taunt. 59. Fearne's Opinions, 338.

with citing the case in 1 Inst. 376 *a.* and *b.*, where it is laid down, that if the heir at common law and the heir in borough english are jointly vouched, and vouch over the common vouchee, the heir in borough english will have the whole recompence in value, because it is he who sustains the loss; and so of heirs in gavelkind. Judgment was given that the recovery barred the estate tail.

1 Inst. 185 *a.*

25. Where two persons are seised as joint tenants for life, with a remainder in tail to one of them, the person who has the remainder in tail may suffer a common recovery, which will bar his moiety of the estate for life, and also a moiety of his estate tail; for the recovery severs the jointure.

Marquis of Winchester's Case, 3 Rep. 1.

26. Thus, where a gift was made to Lionel Morris and Ann Miles, of the manor of M., to hold to the said Lionel and Ann, and to the heirs of the body of the said Lionel, remainder over. A writ of entry was brought against the said Lionel, who vouched over the common vouchee, and judgment was given, and execution had, according to the usual form of common recoveries. It was unanimously resolved, that although Ann Miles was jointly seised with the said Lionel for her life, so that as well Lionel as the vouchee might have abated the writ; yet when the vouchee, without demand of any lien, entered generally into the warranty, and thereby admitted the writ good, and Lionel recovered in value against the vouchee, who entered, according to the estate of the person who vouched; therefore, as to one moiety, the recovery was a good bar to the estate tail, and to the remainder over, because the jointure was severed; but as to the other moiety, whereof Ann Miles was tenant for life, the recovery was no bar either to the

estate tail which Lionel had, expectant on the estate for life of Ann Miles, or to the remainder, because for this moiety Lionel was not tenant to the *præcipe*.

Tit. 18. c. 1. § 46.

27. It has been stated in a former title, that husband and wife being considered, in law, as one person, if an estate be limited to them and the heirs of their bodies, or to them and their heirs, they do not take by moieties, but are seised of one entire estate, and the husband alone takes nothing; not the whole estate, because the wife has a joint estate with him in possession; nor an undivided moiety of the estate, because there are no moieties between husband and wife: so that if the husband alone suffers a common recovery of an estate of this kind, it will be no bar either to a moiety, or to the whole.

Owen v. Morgan, 3 Rep. 5.

28. Thus, where lands were rendered by fine to husband and wife for life, and to the heirs of the body of the husband. A *præcipe* was brought against the husband, who suffered a common recovery, with voucher over of the common vouchee, the wife being then alive. It was resolved, that this recovery, suffered by the husband only, should not bind the remainders, because there are no moieties between husband and wife, and the husband has no power to sever the joint tenancy, or to dispose of the land, during the life of the wife, he not being seised by force of the entail; and although the husband survived the wife, yet that was not material, because the law considered the case as it was at the time of the recovery.

Clithero v. Franklin, 2 Salk. 568.

29. So, where it was found that the grandfather covenanted to stand seised to the use of himself and his wife for their lives, with remainder to the heirs male of the said grandfather, on the body of the said wife begotten, remainder over; the grandfather suf-

fered a common recovery and died, his wife having survived him. To support this recovery it was contended, that the case of Owen v. Morgan was not law; for if baron and feme had an entirety, then each had the whole, and therefore the baron might make a good tenant to the *præcipe* for the whole. Pemberton *contra*, that case was never questioned; the wife's estate hinders the entail from executing in the baron; so that it is only a kind of contingent estate after the death of the wife; and the estate tail cannot be tacked to the estate for life of the husband, during the life of the wife, because, during her life there is an intervening estate. It was therefore adjudged, that the recovery was void.

And all Remainders and Reversions.

30. A common recovery duly suffered is not only a good bar to an estate tail, but is also a bar to all remainders, and to the reversion dependent on such estate tail; and also to all charges and incumbrances created by the persons in remainder and reversion.

Capel's Case, 1 Rep. 62.

31. Thus, where William Capel, being tenant in tail, remainder in tail to Richard Capel, Richard Capel granted a rent-charge of 50*l.* *per annum* to his son; afterwards William Capel levied a fine of his estate tail to two persons, against whom a *præcipe* was brought, who vouched William Capel, and he vouched over the common vouchee, by which means a recovery was suffered of the lands. William Capel died without issue, and the question was, Whether this rent-charge, granted by the remainder-man, was barred by the recovery? It was resolved by all the Judges, in the Exchequer Chamber, that this rent-charge was well barred, and that a common recovery, duly suffered by a tenant in tail, should not only bind the remainder, and all leases, charges, and incumbrances granted or made by the person in remainder,

but also the reversion, and all leases, charges, and incumbrances granted or made by the person in reversion; and that there was no difference between a reversion and a remainder, expectant upon an estate tail, in that respect.

32. So where A. was tenant in tail, remainder to B. in fee. B. granted his remainder to a stranger for life, with remainder to the Queen in fee, upon condition. A. the tenant in tail suffered a common recovery; and the question was, Whether the recovery barred the estate for life, and the remainder upon condition to the Queen? It was resolved, that the recovery not only barred the estate tail of A., but also the estate for life in remainder; and that the remainder in fee limited to the Queen was void. Cholmley's Case, 2 Rep. 52.

33. Rowland Morley being seised in fee, made a feoffment to the use of himself, and the heirs male of his body, remainder in tail to several other persons, with a proviso, that if Rowland and Edward his son and Lady Elizabeth Morley should happen to die, and there should be no issue male of Rowland, that then Ann Morley should have a rent-charge out of those lands of 200*l.* a year, until she received the sum of 2000*l.* Edward Morley, the last issue male of Rowland Morley, made a lease for 1000 years, and afterwards levied a fine and suffered a recovery, and died without issue. The question was, Whether the rent-charge of 200*l.* a year, limited to Ann Morley, was barred by this recovery? It was argued, that the rent-charge was only a contingent use, which was not *in esse* when the recovery was suffered: so that the recompence in value could never extend to it, and therefore that it ought not to be barred. As to Capel's case it was observed, that the rent was barred, because it issued out of the remainder in tail, Hudson v. Benson and Baron, 2 Lev. 28. Sir T. Ray. 236.

which was barred by the recovery. But it was resolved, that the rent-charge was barred by the recovery, because all the estates charged with the rent were barred; and that Capel's case ruled the present case; for in that case all the objections were made which arose in the present case. And Sir Matthew Hale observed, that about the 9 Eliz. it was doubted whether, if a remainder for years were limited after an estate tail, it could be barred by a recovery suffered of the estate tail; because the lease for years being only a chattel, no recompence in value could go to it; but it was now universally allowed, that such a lease was barred by a recovery.

1 Mod. 111.

34. If lands be given in tail, determinable on the donor's payment of 1,000*l.* with a remainder over; and before the day of payment the tenant in tail suffers a common recovery; the right of the donor to the 1,000*l.* and also the remainder over, will be well barred.

Lit. § 649. 1 Rep. 135 *b.*

35. If a tenant in tail is disseised, and releases to the disseisor, the estate tail is in abeyance; yet the tenant in tail may suffer a common recovery; which will bar the estate tail, the remainders, and the reversion.

Herbert v. Binion, 1 Roll. R. 223. Poph. 100. Barton v. Lever, infra, c. 8.

36. If a tenant in tail levies a fine with proclamations, and afterwards suffers a common recovery; although the estate tail was destroyed by the fine, yet still the recovery will bar the remainders and reversion depending on the estate tail. The reason

infra, § 45.

usually given for this determination is, that when the tenant in tail is vouched, and comes in upon the voucher, he comes in of all the estates that were ever in him; and as the estate tail was once in him, it is

2 Roll. Ab. 394.

therefore barred. Serjeant Roll says, the reason of the determination is, because a common recovery is

a common assurance. It has also been said that the tenant in tail, after levying a fine, has still a *scintilla juris* in him, which enables him to bar the remainders.

87. In the case of a tenant in tail levying a fine, and then dying, leaving issue; it seems to be a doubtful point whether such issue can, by suffering a common recovery, bar the remainders and reversion depending on the estate tail. No case of this kind has, I believe, ever been judicially determined; but it is highly probable that if a case of this nature arose, the Judges would determine, that the remainders depending on such an estate might be barred by a common recovery, in which the issue in tail was vouched; for otherwise such remainders and reversion must continue to subsist as a future estate or interest, to take effect in possession upon the remote event of a general failure of issue of the tenant in tail; incapable of being barred or destroyed by any means whatever. This would be a perpetuity to a greater degree than what is allowed by our law, or should be permitted in any commercial country. 2 Atk. 201. Fearne's Op. 442.

It may also be observed, that if a tenant in tail, after levying a fine, has still in him a *scintilla juris*, sufficient to enable him to suffer a common recovery, that *scintilla juris* will descend to the issue in tail, and therefore they will be as well enabled to suffer a common recovery as their ancestor was.

88. It has been determined that if a tenant in tail be attainted of treason, and afterwards suffers a common recovery, it will not bar the remainders, or reversion; because a person attainted is not capable of taking any thing but for the benefit of the King; and consequently the recompence in value must go to the King; so that the persons in remainder and 2 Roll. Ab. 394. Godb. 218. 1 Keb. 30. 398.

the reversioner can have no benefit from it, and therefore are not barred. Besides, recoveries being common assurances, the recovery of a person attainted must be void, in the same manner as any other conveyance of his would have been.

Pa. 73. Mr. Pigot, however, seems to have thought that there was such a *scintilla juris* in the tenant in tail, after an attainder, that by a common recovery he might bar his issue, the remainders and reversion; for if the King should pardon the party, and restore the land, he might bar the entail, although the attainder remained in force.

39. An equitable or trust estate tail, and all equitable remainders expectant thereon, and also the equitable reversion, may be barred by a common recovery, of which an account will be given in the next chapter.

Vide infra, c. 10. 40. Estates tail of the gift of the Crown may be barred by a common recovery, unless they have been given as a reward for services; but it appears doubtful whether a reversion in the Crown, expectant upon the determination of an estate tail, is barred by a common recovery.

And an Entail of a Rent-charge. 41. We have seen that a common recovery may be suffered of a rent-charge issuing out of land, and if such a rent be granted in tail, with a remainder over, a recovery suffered by the tenant in tail will bar the entail, and also the remainder.

Smith v. Barnaby, Carter, 52. 12 Mod. 513. Weeks v. Peach, Lut. 1224. 42. Thus, where a person devised a rent of £50 *per annum*, to be issuing out of land, to his son and his heirs; and if the said son should die without heirs male of his body, then he devised it over. The son suffered a common recovery of this rent, and died without issue male.

Lord Ch. J. Bridgman and all the other Judges of the Court of C. P. were of opinion, that the recovery

was good, and the remainder well barred. This judgment was affirmed in the Court of K. B.

43. A distinction has, however, been established between a grant of a rent-charge in tail, with a remainder over of the same rent-charge in fee, and a grant of a rent-charge in tail, without any subsequent limitation of it in fee: in the first case, the tenant in tail acquires an estate in fee simple in the rent-charge, by the operation of the common recovery; but in the second, he only acquires a base fee, determinable on his decease and failure of issue.

Chaplin v. Chaplin, 3P.Wms.229. Pigot, 97.

44. It has been stated that a common recovery may be suffered with single, double, or treble voucher; and Pigot says, if a recovery is suffered without any voucher, as if judgment is given upon default, confession, or *nient dedire* of the tenant, it does not bind the issue in tail; because they have no recompence, and are not estopped by their father's judgment, as they claim paramount the estoppel, *per formam doni;* and therefore they may falsify such a recovery.

Effect of Recoveries with single and double Voucher. Pa. 108.

45. A recovery with single voucher, that is, where the *præcipe* is brought against the tenant in tail himself, who immediately vouches over the common vouchee, is a good bar to the estate whereof the tenant in tail is in possession at the time of the recovery, but is no bar to any other estate. A recovery with double voucher, that is, where the tenant in tail is vouched, and vouches over the common vouchee, is a good bar, not only to the estate whereof he is then in possession, but also to all other estates in the land to which he has any right, although such estates be divested out of him and discontinued. A recovery with treble voucher is used to make a perpetual bar of the estate whereof the tenant to the *præcipe* was seised, and also of every

Moor, 256. Bro. Ab. tit. Recov.19.30.

estate of inheritance which has ever been in the first or second vouchee, or their ancestors; and also of all remainders and reversions depending on those estates, and all charges and incumbrances derived out of those remainders and reversions.

Pigot, 109. 114.

46. The reason of the difference between a recovery with single and a recovery with double voucher is, that in a recovery with single voucher, if the tenant is not seised of the estate tail at the time, the issue in tail may, after the death of the ancestor, plead *nient tenant tempore brevis, nec unquam postea*, and by that means avoid the recovery; for the tenant in tail not being seised of the estate tail at the time of the recovery, the recompence in value can only go in lieu of the estate whereof he was then seised, and not in lieu of the estate tail; so that as to the issue in tail, it only operates as a recovery on a false title, which never bound them, because they could have no recompence in value: but where the tenant in tail comes in upon the voucher of the tenant to the *præcipe*, without demanding the lien or counterpleading the warranty, he then comes in, in privity, of all the estates he ever had, though the precedent estate, on which the voucher depends, is divested, discontinued, and turned to a right, and the recompence in value which he has, or possibly may have, bars the issue in tail.

47. If therefore a tenant in tail be disseised, or discontinue the estate tail, by fine or feoffment, and takes back an estate to himself in fee or in tail, and then suffers a common recovery with single voucher, it will not bar the estate tail.

ante, § 7.

48. Thus, in Taltarum's case, it was resolved, that the issue in tail was not barred by the recovery of his ancestor, because it was only with single voucher,

and the tenant in tail was not actually seised of the estate tail at the time of the recovery.

49. So if there be tenant for life, remainder in tail to another person, and a stranger disseises the tenant for life, and then enfeoffs the person in remainder, against whom a *præcipe* is brought, and he suffers a common recovery, this will not bind the remainder in tail, because the tenant in tail was not seised thereof at the time when the recovery was suffered, but had only a right thereto; and so the recompence in value could not extend to it. Lincoln College Case, 3 Rep. 58.

50. Where a woman, who was tenant for life, married the remainder-man in tail, and they joined in levying a fine, *sur done, grant, and render*, whereby the lands were rendered to the woman for life, with remainder to the husband and his heirs; afterwards the husband and wife suffered a common recovery, with single voucher, to the use of the husband and his heirs. It was resolved that this recovery was no bar, because the person who suffered the common recovery was not seised of the estate tail at the time, but of an estate in fee, which he had taken back by the fine; so that the recompence in value went to the new estate in fee, and not to the old estate tail. Peck v. Channel, Cro.Eliz.827.

51. In the same manner, where tenant in tail, with remainder over, covenanted to stand seised to the use of himself and his heirs, until the marriage of his son, then to the use of himself for life, remainder to the use of his son and the heirs of his body; then suffered a common recovery with single voucher, and died without issue. It was adjudged, that the recovery did not bar the remainder expectant on the estate tail, because the covenant to stand seised had changed the estate tail into an estate in fee; so that Freshwater v. Rois, Yelv. 51

the person who suffered the recovery was not seised of the estate tail at the time.

52. Where a person is tenant for life, with an intervening estate of freehold to trustees, for preserving contingent remainders to his sons and daughters, and an unexecuted remainder in tail to himself, remainder over; a recovery with single voucher will not bar the remainders.

Meredyth v. Leslie, 6 Brown Parl. Ca. 338.

53. Thus, where Charles Meredyth, being seised in fee of the lands in question, and having one son, Henry, by a former wife, previous to his marriage with his second wife Judith Savage, by articles in consideration of the then intended marriage, which soon after took effect, and of 1000*l.* marriage portion, and of his natural affection for his son Henry, covenanted to stand seised of the said premises, to the use of himself for life, and after his decease to the use of Judith for her life, and after her decease to the use of his son Henry for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of Henry in tail male, remainder to his daughters in tail, *remainder to the heirs of the body of Henry*, remainder over. By indenture *tripartite*, between the said Charles Meredyth, and Henry Meredyth, his eldest son and heir apparent, of the first part; Philip Savage and Henry Luther, of the second part; and H. Wybrants, of the third part; it was witnessed, that in performance of the said articles they the said Charles and Henry covenanted, that Charles, and Judith his wife, and Henry, would, before the end of Michaelmas term then next, levy a fine and suffer a recovery of the lands comprised in the said articles, to the use of Charles Meredyth for life, and after his decease, then as to a certain part of

the said lands to Judith Meredyth for life, for her jointure, remainder, after the death of Charles and Judith, to Henry for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Henry in tail male, remainder to his daughters in tail, *remainder to the heirs of the body of Henry*, remainder over. After the death of Charles Meredyth, his son Henry entered upon the lands comprised in the articles and settlement, and suffered a recovery with single voucher, the writ of entry being brought against himself as tenant of the freehold, who vouched over the common vouchee. One of the questions in this case was, Whether this recovery suffered by Henry barred the estate tail of Henry, and the remainders over? The House of Lords directed the Judges to deliver their opinion upon the following question: "A. tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to his daughters in tail general, remainder to the heirs of his body, with remainders over. A. suffers a recovery with single voucher, being himself tenant to the writ. Whether this recovery is good to bar the remainders expectant upon the estate tail of A.?" Whereupon the Lord Chief Justice of the Court of Common Pleas, having conferred with the Judges present, delivered their unanimous opinion, That the recovery with single voucher did not bar the remainders over. And the House of Lords decreed accordingly.

54. In the preceding cases, if the recoveries had been suffered with double voucher, they would have been a good bar; because, as the tenant in tail would then have come in upon the voucher, he would have been

Sheffield v. Ratcliffe, 2 Roll. Rep. 418. Pigot, 116.

barred of all the estates and interests which were ever in him.

ante, § 27, 8.

55. We have before seen, that where an estate is given to a husband and wife, and the heirs of their bodies, with a remainder to the husband in tail, a recovery suffered by the husband alone will not bar his remainder; because, there being no moieties between husband and wife, the husband is not seised of the estate tail during the life of his wife. But if, in a case of this kind, the husband suffers a recovery with double voucher, it will be a good bar of the husband's remainder; because when he comes in as a vouchee, he comes in of all the estates that are in him.

Cuppledike's Case, 3 Rep. 5.

56. Thus, where A. and his wife were seised of the manor of B. to them and the heirs male of the body of the said A. The husband levied a fine, and a writ of entry was brought against the cognisee of the fine, who vouched the husband, and he vouched over the common vouchee, and judgment was given in the usual manner. The question was, Whether the remainder was well barred by this recovery, the wife not being vouched? And it was resolved, that the recovery should bar the remainder; for although the husband alone was vouched, and not his wife, who had a joint estate with him, yet the husband coming in as vouchee, the recovery barred all the estates which were ever in him.

Fitzwilliam's Case, 6 Rep. 32.

57. So, where A. was seised of a manor to him and his wife, and to the heirs male of the body of the husband. A. bargained and sold the manor to a stranger, who suffered a common recovery, in which A. was vouched, who vouched over the common vouchee. It was adjudged, that although A. alone

was vouched, and not his wife, yet that the estate tail was barred, for the reasons given in the last case.

58. In the same manner, where A., who was seised in fee of the lands in question, upon the marriage of his son D. covenanted to stand seised, to the use of himself for life, remainder to the said D. and his wife, and the heirs male of their bodies, remainder to D. and the heirs male of his body, with several remainders over. A. died, and D. suffered a common recovery with double voucher, in which he alone was vouched, and vouched over the common vouchee: the wife died, and afterwards D. died without issue. It was agreed, 1st, That this settlement being made before marriage, when the husband and wife took by moieties, and not by entireties, the husband had an absolute power over his own moiety, and therefore, as to the husband's moiety, the recovery was a good bar: in which this case differs from that of Owen v. Morgan, where the settlement being made after the marriage, the husband and wife took by entireties. 2dly, That this recovery was no bar to the moiety of the wife, because she was not vouched. 3dly, That the estate tail, which was limited to D. and his wife and the heirs male of their bodies, being determined, the remainder to D. in tail male general, and all the other remainders depending thereon, were absolutely barred by the recovery; for when D. was vouched, and vouched over, he came in of all the estates he had, and consequently the remainder in tail male to himself, and all the remainders depending on it, were well barred. Hallet v. Saunders, 2 Lev. 107.

59. Edward Moody, tenant in tail under his father's will, with a contingent remainder in fee to himself, being about to marry, in 1709 conveyed, by Moody v. Moody, Amb. R. 649.

way of immediate use, to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to himself and his wife in fee. Edward Moody afterwards made his will, and devised part of his estate, of which he had suffered a recovery, to his younger son, after the death of his wife. The wife died, and the eldest son set up a title to the estate. The bill was brought by the younger son. It was argued for the plaintiff, that the conveyance being before marriage, the husband and wife were entitled in moieties, and in that respect differed from the case of a conveyance to husband and wife after the marriage; and that the recovery in which only the husband was vouched barred a moiety of the estate. This was said to be doubted in Cuppledike's case, but was settled in Hallet and Saunders.—It was argued for the defendant, 1st, That there being a covenant in the settlement to do all further acts by fine, recovery, &c., the recovery suffered by Edward Moody was to be considered as an act done, not in destruction, but in confirmation of the settlement. 2d, That the husband and wife were seised of an entire estate, which, according to Lord Coke, is inseparable; and therefore the recovery, in which the husband alone was vouched, was void *in toto*. In reply it was said, as to the first question, that Edward Moody being seised of two estates tail, the recovery barred both, and as to the second, the distinction was relied on between a joint estate given to the husband and wife before marriage, and a joint estate given to them after marriage; the former is severable, the latter not. Lord Camden (Chancellor), after taking time, from the 24th January to the 30th May, for consideration, gave his opinion, First, That the recovery was a confirmation of the settlement and not a destruction of

ante, § 56.

it, being to be considered as a bar of the old entail only. This was a slight question, and deserved little notice: where tenant in tail is vouched, he comes in of every estate he has: if it had been his intention only to have barred the old entail, he would have declared so. 2d question, which is the only one that deserves serious consideration, is as to the operation of the recovery. In general, a fine or recovery by one joint tenant only, severs the joint tenancy, and operates on a moiety. Co. Lit. 187. makes the distinction between a joint estate given to the husband and wife during the marriage, and a joint estate to them before marriage. In the former case their interest is not severable, in the latter case they take in moieties. The doubt in Cuppledike's case arose on a joint estate during marriage; and 1 Leon. 270. is mistaken as to Lord Coke's doubt, for the case of a joint estate before marriage is not mentioned in Cuppledike's case. The question seems to have been determined in Simmond's case, Moore, 92; the only doubt is, whether the husband and wife can hold moieties; and in that case all the Judges held, there were several estates tail between husband and wife. It follows that the recovery in this case is a severance of the joint estate, and passes a moiety.

60. The power of suffering a common recovery is one of those privileges which is so inseparably annexed to an estate tail, that it cannot be restrained by any condition, limitation, proviso, or covenant whatsoever.

The Power of suffering a Recovery cannot be restrained. 1 Inst. 223 *b.* 1 Burr. 84.

61. Thus, where C. Corbet covenanted to stand seised of lands to the use of himself for life, remainder to the use of R. and the heirs male of his body, with divers remainders over. Provided that if R. or any of the heirs male of his body should attempt or

Corbet's Case, 1 Rep. 83. Mildmay's Case, 6 Rep. 40.

procure any act, or thing, by which any estate tail so limited should be undone, barred, or determined, that then the uses and estates to him limited, who should so do, &c. should cease, only in respect to such person so attempting, in the same manner as if such person so attempting, &c. were naturally dead; and that then immediately in all such cases, the uses of such lands should be to such persons, for such and the like estate, and in the same manner and form, and with such remainders over, and under such limitations and restrictions, &c. as if such persons so attempting, &c. were naturally dead. Afterwards Corbet died, and R. the first tenant in tail suffered a common recovery to his own use. The person next in remainder entered; and upon the question, whether such entry was lawful or not, the Court of Common Pleas unanimously agreed, that this *proviso* to cease an estate limited to one, and the heirs male of his body, *as if the tenant in tail were dead*, was repugnant, impossible, and against law. For the death of tenant in tail, was not a cesser of the estate tail, but the death of tenant in tail without issue of his body, was the determination thereof.

Mary Portington's Case, 10 Rep. 37.

62. So where lands were devised to several daughters successively in tail, with a *proviso*, that if any of them should conclude and agree to or for the doing or execution of any act, &c. whereby the lands entailed, &c. or any estate or remainder thereof should by any way or means be discontinued or aliened, or should do any act or thing whereby the lands might not descend, remain or come as limited by the will, that then the person so concluding and agreeing to or for the doing and execution of any such act, &c. should immediately after such conclusion and agreement, &c. lose and forfeit such estate and benefit as

she and they might claim, in such manner as if she or they had never been named in the will, and thenceforth the estate and estates limited to her or them should utterly cease, as fully to all intents and purposes as if she or they were *dead, without heirs of their bodies.* The first tenant in tail concluded, and agreed to suffer a common recovery, and suffered one accordingly; the next in remainder claimed the estate as forfeited; and contended, that if the donor could not restrain the recovery after it was suffered, because thereby the remainder was barred, yet he might restrain the conclusion and agreement to suffer it, to prevent the bar by the recovery. But it was adjudged, that tenant in tail cannot be restrained by any condition or limitation from suffering a recovery; and that it was absurd to say that the recovery itself cannot be prohibited by any condition or limitation, and yet that the conclusion or agreement to suffer it may be prohibited; and it was also laid down in the arguments in the same case, that the levying a fine within statute 4 Hen. VII. c. 24. and 32 Hen. VIII. c. 36. to bar the issue, was of the number of those incidents to an estate tail which could not be restrained by condition.

63. Although a condition that tenant in tail shall not suffer a recovery is void, yet it appears to have been held by Lord Cowper, that a covenant not to suffer a common recovery will bind the assets of the covenantor.

64. Thus, where a person, in consideration of marriage, settled lands upon himself for life, remainder to his intended wife for life, remainder to the heirs of his body on his wife to be begotten, remainder to his own right heirs, and covenanted with the trustees, that he would not suffer any recovery to bar the limi-

Collins v. Plummer, 1 P. Wms. 104. 2 Vern. 635.

tations in the settlement. The husband suffered a recovery of these lands to the use of himself and his heirs. The Lord Chancellor was of opinion, that the covenant did not bind the land so as to defeat the recovery. But it being pressed, that they might be at liberty to sue the executor, and recover out of the personal assets, an issue was directed to try what the wife and the issue of the marriage were damnified by the breach of this covenant.

Vide 2 Vernon, 233. 251.

King v. Burchell, Amb. 379.

65. Where an heir in tail is disinherited by a common recovery, and seeks for relief in a court of equity, the recovery, together with the deeds for making a tenant to the *præcipe*, will be directed to be brought before a Master, that the person thus barred may have an opportunity of inspecting them, and of seeing whether any thing can be discovered for his advantage.

An Heir in Tail allowed to inspect Title Deeds, &c. 2 P. Wms. 177. Bettison v. Farringdon, 3 P. Wms. 363.

TITLE XXXVI.

RECOVERY.

CHAP. VIII.

Effect of a Recovery in barring particular Persons, Estates, and Interests.

2. *Parties.*
3. *Married Women.*
9. *Trust Estates.*
21. *Powers appendant and in gross.*
24. *But not Powers collateral.*
25. *Conditions and conditional Limitations.*
32. *Contingent Remainders.*
35. *Writs of Error to reverse Fines.*

SECTION 1.

A COMMON recovery differs very much in its operation from a fine, for it has not the effect of establishing an undoubted title after a certain number of years. A fine was originally introduced into our law as a public and solemn mode of alienation, and its force in barring entails arose from two statutes, made some centuries after. A common recovery was first introduced, for the purpose of barring entails only, and therefore it has not so extensive and powerful an effect as a fine. But in consequence of the principle, that where a recovery is suffered, the recoveror thereby acquires a new estate in fee simple, it follows that a recovery has several other effects besides that of barring estates tail.

2. All those who are parties to a recovery are bound by it, because, being a matter of record, they Parties.

infra, c. 9. § 1. ante, c. 5. § 7.

are estopped to aver any thing against it; except infants, and that only where the recovery is reversed during their minority.

Married Women. Tit. 35. c. 10.

3. Where a married woman joins with her husband in suffering a common recovery of her own estate, she will be bound by it as effectually, and for the same reason, as if she had joined with him in levying a fine.

Incledon v. Northcote, 3 Atk. 430.

4. Thus it was held by Lord Hardwicke, that where a married woman, having the trust of a term in her, joined her husband in suffering a common recovery of the lands out of which the term was created, she was thereby barred of all her claim to it; for she came in by voucher, in privity of all her estate, legal and equitable.

2 Inst. 347.

5. By the statute Westm. 2, c. 4, reciting, that where a husband was impleaded and gave up the land demanded to his adversary by covin, after the death of the husband, the Justices should award the wife her dower; but that where the land was lost by default, there was a difference of opinion: it was therefore declared, that in both cases the widow should be heard, and if it was alleged against her that her husband lost the land by judgment, and it was found that it was by default, then that the tenant should show that he had right, and if he could show that the husband had no right, he should go quit, and the wife recover nothing; but if he could not show that, the wife should recover her dower.

6. It follows from this statute, that a common recovery, suffered by a husband alone, will not bar his wife of dower; and it was much doubted whether a woman was barred of dower by joining her husband in suffering a common recovery; nor was the point settled till the reign of Queen Elizabeth.

7. Thus in the case of Eare v. Snow it was said that the wife was named in the *præcipe* only to be barred of her dower; to which purpose women were named in common recoveries had against their husbands; and the usage in this case was to be regarded, for in such cases it had always been the intent of the parties, before that time, that the wife should be barred of her dower. ante, c. 7. § 20. 2 Rep. 74 *a.*

8. Pigot says he heard some learned men question this, because the woman has then no estate *in esse*: but the same might be said against a fine, and the common recovery estops her as party, and disaffirms her husband's title to the lands, of which she was dowable. 66.

9. It has been stated that a trust or equitable estate may be entailed as well as a legal one; and it has been long settled that a common recovery suffered by a *cestui que trust* in tail, who is in possession under the trustees, will effectually bar such estate tail, and all equitable remainders, and the equitable reversion depending thereon; although there be no legal tenant to the *præcipe*. Trust Estates. Tit. 12. c. 2.

10. Sir Francis North purchased certain lands in Essex from R. Allington, who was *cestui que trust* in tail of them, with remainders over, and had suffered a common recovery; but there was no legal tenant to the *præcipe*, the freehold being in the trustees, who were not parties. The question was, whether the remainders expectant on the estate tail were barred by this recovery. The decree was in these words: —"His Lordship, upon long debate of the matter, on hearing what was alleged by the counsel on either side touching the same, declared that he was fully satisfied that the said recovery did sufficiently bar all remainders depending upon the estate tail of R. Allington, who suffered the same; it being a North v. Champernoon, 2 Cha. Ca. 63. 78. 1 Vern. 13. 1 P. Wms. 91.

general rule, that any legal conveyance or assurance by a *cestui que trust* shall have the same effect and operation upon a trust, as it should have had upon the estate in law, in case the trustees had executed their trust; otherwise trustees, by refusing, or not being able to execute their trust, might hinder the tenant in tail of that liberty to dispose of his estate, and bar the remainders, which the law gives him as incident to his estate; which would be manifestly inconvenient, and tend to the introduction of perpetuities."

11. In recoveries of this kind there must be an equitable tenant to the *præcipe*; that is, the trust estate must be conveyed to a third person, against whom the writ must be brought, in the same manner as in recoveries of legal estates.

2 Cha. Ca. 64.

12. If there be a *cestui que trust* for life, before the *cestui que trust* in tail; so that in case the legal estate had been conveyed according to the trusts, the tenant in tail could not bar the estate tail by a common recovery; there the *cestui que trust* in tail cannot bar his estate tail by a recovery.

Fearne's Opinions, 330.

13. It was formerly held that a feme covert to whom a trust estate was limited for life, for her separate use, could not make a good equitable tenant to the *præcipe*, without joining with her husband in a fine. But in a modern case, where an estate was devised to trustees and their heirs, in trust to receive and pay over the rents and profits to a married woman for life, for her separate use; and after her decease, to convey the estate to her daughters, as tenants in common in tail; it was held by Lord Alvanley that the wife took an equitable estate for life; and that a conveyance from her and her husband, by lease and release, was sufficient to make a good equitable tenant to the *præcipe*.

Burnaby v. Griffin, 3 Ves. Jun. 266.

14. Where an estate is conveyed or devised to trustees and their heirs, upon trust to pay debts generally, or such debts as are specified, and after payment of such debts, or when such debts shall be paid, then in trust for A. B., or in trust to convey such parts of the estate as shall remain unsold to A. B.; in either of those cases A. B. has a trust estate in the surplus vested in him immediately upon the execution of the deed, or the death of the testator, and may suffer an equitable recovery of such estate. Vide Tit. 12. c. 1. § 33.

15. This point was lately investigated with great learning and ability, in consequence of an objection that was made to the title of the Marquis of Bath to an estate, upon the following case:

By a settlement previous to the marriage of Lord Bath (then Lord Weymouth) certain estates were conveyed to the use of Lord Bath for life, remainder to the intent that Lady Bath should receive a jointure, remainder for a term of years, to raise portions for younger children, remainder to the first and other sons of the marriage. The estate thus settled being subject to several incumbrances, other estates were limited to trustees in fee, upon trust to stand seised thereof as a collateral security to protect the settled estates; and in order to discharge the said incumbrances it was declared that the trustees should, by mortgage or sale of the estates conveyed to them, raise such sums of money as should be necessary to pay off the incumbrances; and it was agreed, that after all the incumbrances should be paid, and all the other trusts should be performed, the trustees should stand seised of so much of the said estates as should remain unsold, and of the equity of redemption of so much as should have been mortgaged, Vide Collectanea Juridica, vol. 1. p. 214.

upon trust to settle and convey the same to Lord Bath for life, remainder to his first and other sons in tail male. No sale or mortgage was ever made by the trustees, nor were any of the incumbrances paid off until 1787, when Lord Bath and his eldest son joined in a recovery of the estates which had been conveyed to the trustees. The validity of this recovery was objected to, because it was suffered before the debts were paid; and the objection was founded on a *dictum* of Lord Hardwicke in the case of Bagshaw v. Spencer, which was a devise to five persons and their heirs, in trust to pay debts, and then as to one moiety to the use of Benjamin Bagshaw for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of Benjamin Bagshaw, remainder over. Benjamin Bagshaw suffered a recovery before the debts were paid; and a suit in Chancery being instituted to ascertain what estate Benjamin Bagshaw took by this devise, Lord Hardwicke said, that the devise to Benjamin Bagshaw was merely a trust in equity; for, as the first devise was to the trustees and their heirs, it carried the whole fee in point of law: that it could not be construed an executory devise of the legal estate, for in that case it would be too remote, being given after all debts should be paid, which might, in point of time, exceed a life or lives in being, or any other time allowed by law. After which, his Lordship is stated to have said these words: "That the recovery suffered was before the debts were paid, and, consequently, Bagshaw could not make a good tenant to the *præcipe* to support the recovery." Upon the authority of this passage it was contended, that whether the limitation to Lord Bath was considered as a springing or shifting use at law, or a springing

2 Atk. 578.
1 Ves. 144.

executory trust, it was not barred by the recovery suffered by Lord Bath, because, at the time of suffering the recovery, the event on which the limitation was to take effect, namely, the discharge of the debts, had not happened. On the other side it was clearly laid down and proved, by Sir John Scott, Mr. Maddocks, and Mr. Fearne, that the limitation to Lord Bath in the settlement, gave him an immediate vested interest in the surplus of the estate after payment of the debts; that in the case of Bagshaw and Spencer, both the Master of the Rolls and Lord Hardwicke agreed that the devise to Benjamin Bagshaw was an interest actually vested in him. As to the idea of its being an executory devise of the legal estate, Lord Hardwicke said, if the will was to be construed in that manner, the devise would be too remote, being after payment of debts; but even admitting it to be a good executory devise of the legal estate to Benjamin Bagshaw, yet it did not vest in him, nor could his devisee claim it, *because the recovery was suffered before the debts were paid, and consequently whilst the fee was in the trustees, so that he could not make a good tenant to the* præcipe. The meaning of the expression of Lord Hardwicke, so much relied on, was therefore no more than this—that a person to whom an executory devise of a legal estate is made, cannot suffer a recovery until the event, on which the executory devise is directed to take effect, has happened.

It was admitted that there was a strict analogy between executory devises and springing executory trusts, from which it was concluded, that if a devise of an estate after payment of debts was not good as an executory devise, a limitation of the same kind in a deed would be void as a future executory trust;

consequently the trust created in Lord Bath's settlement, to settle the estates after payment of the debts, would have been void as an executory use or trust, and the estate must have resulted to Lord Bath and his heirs, who was the original owner of the inheritance; from whence it followed, that any conveyance by Lord Bath would make a good equitable title, subject to the trust for payment of the debts. It was lastly said, that the payment of debts was not a condition precedent, which must be performed before a subsequent limitation or devise could take effect, but such subsequent limitation or devise was an interest commencing at the same time, and concurrent with the limitation or devise for payment of debts; and the words *after payment of debts*, or *when the debts shall be paid*, only denoted the order or course in which the several interests should take place in point of actual possession and perception of the profits, without preventing the subsequent estates, whether legal or equitable, from becoming vested in interest, at the same time with those which were prior to them in point of limitation.

Pigot v. Waller, 3 Ves. Jun. 98.

16. It was determined in a modern case, that a trust estate passed by the deed, to make a tenant to the *præcipe*; the words being sufficiently extensive for that purpose; although the tenant in tail did not apprehend, at the time, that the estate belonged to him; and that, as no adverse possession was shown, the rightful owner must be presumed to have been in possession.

Robinson v. Cumming, Forrest. 167. 1 Atk. 473.

17. Recoveries of this kind only operate on the trust estate whereof they are suffered, and the equitable remainders expectant thereon, but do not affect any legal estate; so that a legal remainder cannot be barred by an equitable recovery.

18. Thus, where John Thornton, being seised of the premises for life, with remainder to his first son Thomas in tail male, remainder to his second son James in tail male, forfeited in the rebellion in 1745. The estate for life being put up for sale by the commissioners, was bought by Thomas (the tenant in tail), but in the name of a trustee. Thomas, thus having the equitable estate for the life of his father, and the legal estate tail, suffered a recovery, and soon after died, leaving issue a daughter, wife to the plaintiff. James, the second son, took possession, suffered a recovery (after the death of his father and the trustee, in whom his estate vested), and died, leaving two daughters, the defendants, who were in possession. The bill was filed by Salvin, in right of his wife, for an account of profits, and to have the estate delivered up. Upon the hearing at the Rolls, his Honour ordered the bill to be retained for a year, with liberty to try the validity of the recovery at law. But it was the opinion of the Court, that Thomas's estate for life being an equitable estate, did not enable him to suffer either a perfect legal, or a perfect equitable recovery, and therefore the recovery suffered operated nothing.

Salvin v. Thornton, cited 1 Brown's Cases in Chan. 73. Amb. Rep. 545. 699.

19. It was held in a modern case, that where an estate was devised to a person in fee simple, upon trust for several persons successively in tail, remainder in tail to the devisee in trust, such remainder might be barred by an equitable recovery: for to create a merger of the equitable in the legal estate, by their union, both estates must be co-extensive and commensurate; and therefore that an equitable recovery would bar an equitable remainder in tail, in the person who had the whole legal fee.

Brydges v. Brydges, 3 Ves. Jun. 120.

Wykham v. Wykham, 18 Ves. 395.

20. In the above case Lord Alvanley said, that though a legal remainder could not be affected by an equitable recovery, yet the converse of that proposition was not true; for a legal estate in the tenant to the *præcipe* was no objection. The very point was determined in the case of Marwood v. Turner.

3 P. Wms. 171.

Powers Appendant and in Gross.

21. Where a person has a power appendant or in gross, if he suffers a common recovery of the lands to which the power relates, it will bar and destroy it; because the lands are supposed to be recovered by a right which is paramount to that of the person who created the power, and which therefore over-reaches such power.

King v. Melling, 1 Vent. 225. 2 Lev. 58.

22. Lands were devised to Bernard Melling for life, and after his death to the issue of his body by a second wife, he being then married to his first wife; and for default of such issue, to another person, provided that B. Melling might settle a jointure on his second wife. B. Melling entered on the death of the devisor, and, during the life of his first wife, suffered a common recovery, to the use of himself and his heirs.

It was agreed in the Exchequer Chamber, 1°. That B. Melling took an estate tail by the devise. 2°. That the power to make a jointure was destroyed by the recovery. And it was laid down by Lord Hale, that admitting B. Melling had but an estate for life, the power was destroyed.

Saville v. Blackett, 1 P. Wms. 777.

23. A settlement was made of lands to the use of A. for ninety-nine years, if he should so long live; remainder to trustees during the life of A. to preserve contingent remainders, remainder over, with a power to A. to charge the lands with divers sums of money. A., the trustees, and the remainder-man in tail, joined

in suffering a common recovery, and declaring new uses thereof, viz. to the use of A. for life, with remainder over. It was determined, that the joining of A. in making the new settlement, without reserving a power to charge the premises with the said money, had destroyed that power which A. had of charging; for the contrary construction would enable him to defeat his own grant.

24. Powers collateral to the land are not barred by a common recovery, for the same reason that they are not barred by a fine.

But not Powers collateral. Tit. 35. c. 10. § 58.

25. A common recovery suffered by a tenant in tail, bars all collateral conditions and conditional limitations created to take place on the determination of such estate tail.

Conditions and conditional Limitations. Fearne's Ex. Dev. 75. 4th ed.

26. R. Mosely covenanted to levy a fine of certain lands to the use of himself and the heirs male of his body, remainder in tail to several others: provided that if there should be a failure of issue male of his body, and Dame Elizabeth were dead, and Ann Mosely was married, *or* of the age of twenty-one years, then she should have 200*l. per annum* for ten years. R. Mosely died, leaving issue Sir Ed. Mosely, who made a lease for 1,000 years, and then suffered a recovery of the estate tail, and died without issue male.

Benson v. Hodson, 1 Mod. 108. 2 Lev. 28.

The contingencies all happened; and the question was, whether the rent-charge of 200*l.* was barred by the recovery?

Lord Hale said, if tenant in tail grants a rent-charge, and suffers a common recovery, the rent-charge will not be avoided: so that if tenant in tail be, rendering a rent, a recovery will not bar that, though it doth a reversion. But the reason of this case is, because the estate of him that suffers the recovery is charged with the rent. Therefore, if there

be a limitation of a use upon condition, and *cestuy que use* suffers a recovery, that will not destroy the condition, the estate being charged with it; for the recoveror can have the estate only as he that suffered the recovery had it: therefore, so long as any one comes in by that recovery, he comes in in continuance of the estate tail; and coming in so, he is liable to all the charges of the tenant in tail. Now, what is the reason why tenant in tail suffering a common recovery, a rent by him in remainder shall be barred? The reason is, because the recoveror comes in in the continuance of that estate that is not subject to the rent, but is above all those charges; and no recompence can come to such a rent. The difference between this case and Capel's, say they, is, that there the charge arose subsequent, but here the charge arises precedent. But I say the charge arises precedent to the remainder, but subsequent to the estate tail; for it is not to take effect till the estate tail be determined.

ante, c. 7. § 31.

A man made a gift in tail, determinable upon his non-payment of 1,000 *l.*, remainder over. The tenant in tail before the day of payment suffered a common recovery, and did not pay the money; yet because he was tenant in tail when he suffered the recovery, by that he had barred all. If there be tenant in tail, reserving rent, a common recovery will not bar it: so if a condition be for payment of rent, it will not bar it: but if a condition be for doing a collateral thing, it is a bar. And so if tenant in tail be, with a limitation so long as such a tree shall stand, a common recovery will bar that limitation. Judgment accordingly.

Goodear v. Clarke, 1 Lev. 35. 1 Keb. 73.

27. Nicholas Searle devised lands to his niece Mary Bryant, and the heirs male of her body, upon condition and provided she intermarried and had

Page v. Hayward, Pigot, 176.

issue male by a person surnamed Searle; and, in default of both these conditions, he devised the lands to Elizabeth in the same manner. Mary Bryant married one Cliff, and with him levied a fine, and suffered a recovery of the lands, in which she and her husband were vouched. It was adjudged by the whole Court; 1st. That the estate devised to Mary was a good estate in special tail; that is, to her and the heirs male of her body begotten by a Searle. 2d. That the words upon condition, &c. though express words of condition, should be taken to be words of limitation. 3d. That the estate tail of Mary did not cease by marrying a person whose name was not Searle, because she might possibly survive her first husband, and afterwards marry a person of the name of Searle. 4th. That if the estate had been devised to Mary, and the heirs male of her body, by a Searle to be begotten, provided, and upon condition, that if she married any other person but a Searle, the estate should go over, a common recovery suffered before marriage would bar the estate tail and remainders. And the Court took a difference between a collateral condition, and a condition that runs with the land; for if a donor reserves a rent with a condition to re-enter, a recovery will not bar it; *aliter*, if the condition be to re-enter for non-payment of a sum in gross. 1 Mod. 108. 111. 2 Lev. 28.

28. So, where lands were devised to several persons successively in tail, with a *proviso*, that whenever the estates devised should come to any of the persons therein named, they should take upon them the name of W. only, but there was no devise over. The first person to whom the lands were devised in tail, suffered a common recovery of the estate tail, in which he was vouched, and vouched over, and never took the name of W.; the person who was next in re- Gulliver v. Ashby, 4 Burr. 1929.

mainder entered for a breach of the *proviso*, on account of the first devisee's not having changed his name. It was agreed by the whole Court, that if this *proviso* were considered as a condition, it was collateral and subsequent, and was therefore well barred by the recovery.

Amb. Rep. 328.

29. Devereux Edgar being seised of the premises in question, devised them as follows:—"I give and bequeath unto my daughter Temperance Edgar all that my farm or estate called the Breed Farm, &c. to hold the same from and after the death of my wife, to the said Temperance my daughter, and to the heirs of her body lawfully begotten; and for want of such heirs, to my right heirs for ever. *Item*, I give and bequeath unto my daughter Mary Edgar all that my farm, &c. to have and to hold to the said Mary, and to the heirs of her body lawfully to be begotten; and herein my mind and will is further declared, that in case either of my said daughters Temperance or Mary shall happen to die, or depart this life, single, married, or widows, not leaving children or child living at their decease legally begotten, that then her gift, legacy, or bequest herein, or estate given her by this my will, shall be entirely void as to inheritance of heirs, and of none effect; and the estate so given her so dying without heirs of her body, shall descend and go to my heir male and his heirs male." Mary Edgar suffered a recovery of the premises in question, to the use of herself in fee, and afterwards died unmarried. The question was, whether the recovery suffered by Mary Edgar barred the limitation over? Lord Mansfield said, the validity of the recovery suffered by Mary depended upon whether she was tenant in tail, or tenant for life of the estate thus devised to her. Now

Driver ex dem. Edgar v. Edgar, Cowper, 379.

the estate was given to her and the *heirs of her body*, which was an estate tail; nevertheless, the intention of the testator might restrain that estate of inheritance, and confine it to an estate for life only; and although it was insisted that the testator had restrained the estate of inheritance during her life, yet he had restrained it only upon future contingencies, the first of which was the event of her own death; but until that contingency happened, the inheritance was in her. The second was upon her leaving no children. It was manifest that the intention of the testator was, to prevent a common recovery being suffered; but where a testator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, Mary Edgar was tenant in tail to the hour of her death, nothing was so clear, as that all conditions limited upon such an estate tail were avoided by the common recovery which had been suffered; and the Court were of opinion, that Mary took an estate tail by the devise.

Nicolls v. Sheffield, 2 Bro. R. 215.

30. If a gift in tail be made, rendering a rent, and the tenant in tail suffers a recovery, it will not bar the rent, which will still remain as a collateral charge on the land, distrainable of common right; for since the tenant in tail took the land subject to that charge by the original donation, the recoveror who claims under him can only have the estate in the same manner as he who suffered the recovery had it. But if there had been a condition of re-entry, on the non-payment of the rent, it would have been destroyed.

Whyte v. West, Cro. Eliz. 792. 2 Lev. 30. 1 Mod. 109. Pigot, 139.

31. Although a common recovery suffered by a tenant in tail bars all collateral conditions subsequent, and limitations over, yet a common recovery has this operation only when suffered by a tenant in tail; for a recovery suffered by a tenant in fee simple will not

Fearne Ex. Dev. 67 *n.* 4th edit.

bar an executory estate, conditional limitation, or collateral condition.

Contingent Remainders. Tit. 16. c. 6. § 5.

32. A common recovery bars all contingent remainders depending on the estate whereof the recovery is suffered, because the recovery destroys the particular estate on which the contingent remainders depend.

Plunkett v. Holmes, 1 Lev. 11. Sir T. Ray. 28. Gilb. Uses, 133.

33. Thus, where a person devised lands to his eldest son Thomas for life, and if he died without issue living at the time of his death, then he devised the lands to another son and his heirs; but if Thomas had issue living at the time of his death, that then the fee should remain to the right heirs of Thomas for ever. Thomas entered upon the death of his father, and suffered a common recovery, and afterwards died without issue. It was resolved, that Thomas was tenant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was destroyed by the recovery.

Loddington v. Kime, 1 L. Raym. 203. Salk. 243. 3 Lev. 431. Fearne, 282.

34. So where lands were devised to A. for life, without impeachment of waste; and in case he should have any issue male, then to such issue male, and his heirs for ever; and if he should die without issue male, then to B. and his heirs for ever. A. entered, suffered a common recovery, and died without issue; and it was held, that the remainders over being contingent, were barred by the recovery. Another case arose on this will, in which the same point was determined by the House of Lords. And in the cases of Doe *ex dem.* Brown v. Holm, 3 Wilson's Reports 297, Goodright v. Dunham, Douglas 264, and Goodright v. Billington, id. 753, this doctrine is confirmed.

Carter v. Barnadiston, 1 P. W. 505.

Writs of Error to reverse Fines. Tit. 35. c. 14.

35. A common recovery suffered after an erroneous fine, will bar the issue in tail from bringing a writ of error to reverse such fine; and even an erroneous recovery will bar a writ of error to reverse a fine,

until the recovery is reversed; because a common recovery with voucher bars every kind of right which the vouchee or his heirs can have to the land; but a void recovery is no bar.

36. Thus, where R. Barton, being tenant in tail, levied an erroneous fine, and afterwards a writ of entry was brought against the cognizee, who appeared and vouched over R. Barton, and he vouched over the common vouchee. After the death of R. Barton, the issue in tail brought a writ of error to reverse the fine, to which the recovery was pleaded in bar. And it was resolved, that when tenant in tail levies an erroneous fine, he hath yet a right to the land, which, by his entry into the warranty, and recovering thereby an intended recompence in value, is barred. For although tenant in tail cannot by deed release errors to bar the issue in tail, yet as by fine or recovery he may bar the estate tail itself, so may he bar the writ of error; and when he enters into the warranty and vouches over, and hath recompence, he is in by his warranty of all estates, and the recompence in value is a sufficient bar to all estates and rights which he had in him.

Barton v. Lever, Cro. Eliz. 388.

TITLE XXXVI.

RECOVERY.

CHAP. IX.

Of some other Effects of a Recovery.

1. *Is an Estoppel on Record.*
2. *Lets in prior Incumbrances.*
8. *Is a Revocation of a Devise.*
9. *Creates a Forfeiture in some Cases.*
11. *Does not alter the Descent.*
13. *Exception.*

SECTION 1.

Is an Estoppel on Record. Pigot, 123. ante, c. 2. § 56. 10 Mod. 45.

THE judgment in a common recovery being of equal force with that which is obtained in an adversary suit, operates as an estoppel on record against all those who are parties to it, and concludes them from averring any thing against it. But a common recovery, when suffered of an estate tail, will not operate as an estoppel against the issue in tail, the remainder-men, or reversioner.

Lets in prior Incumbrances. 1 Rep. 62 *a*. 2 —— 52 *b*. 9 —— 10 *b*. Pigot, 120. 1 Wils. R. 277.

2. A common recovery suffered by a tenant in tail lets in all his preceding incumbrances, and renders valid all the acts of ownership which he has exercised over the estate tail. So that if a tenant in tail makes a lease not warranted by the statute 32 Hen. VIII., or acknowledges a judgment or recognizance, and afterwards suffers a common recovery; it will operate as a confirmation of these charges, which were before defeasible by the issue. For the recoveror acquires an estate in fee simple, derived out of the estate tail; and therefore all those acts which bound the tenant

in tail, will also bind the recoveror, who cannot aver that the person against whom he recovered had but an estate tail. It is therefore extremely dangerous for a tenant in tail who has made leases, acknowledged judgments, or incumbered his estate tail in any other manner, to suffer a common recovery; because all those incumbrances will thereby become valid, and take place before any charge which is made on the lands, by or after the recovery.

3. Although a recovery be suffered for a particular purpose, yet it will confirm all prior incumbrances. Thus, in the case of Goddard v. Complin, the following question was put:—Tenant in tail mortgages for years, and afterwards, in consideration of marriage, suffers a recovery, for the purpose of settling a jointure on his wife. Whether this recovery should enure to make good the mortgage, it being only designed for establishing the marriage settlement? It was answered, that if there had been no recovery, there could have been no jointure, nor could the wife have avoided the mortgage, for she was in by the act of her husband, and no subsequent act of the husband could have avoided the mortgage. It was also said, that if a tenant in tail confesses a judgment, &c. and suffers a recovery to any collateral purpose, the recovery shall enure to make good all his precedent acts and incumbrances. 1 Chan. Ca. 119.

4. Where a tenant in tail makes any conveyance or settlement of his estate tail, which is not binding on his issue; if he afterwards suffers a common recovery, it will enure to make good the preceding conveyance or settlement.

5. Gerard Walker the father, by settlement on his marriage, conveyed an estate to the use of himself for life, remainder to the first and other sons of the marriage in tail. In 1733 the son, on his marriage, con- Cheney v. Hall, Amb. Rep. 526.

veyed part of the estate by lease and release to the use of himself for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs. In 1746 the father and son mortgaged the premises to Henry Peach for 1,000 years to secure 300*l.* and suffered a common recovery, and declared the uses to the mortgagee, and then to the father for life, remainder to the son in fee. Lord Northington was clearly of opinion that the recovery enured to the uses of the settlement of 1733.

Goodright v. Mead, 3 Burr. 1703.

6. A person, seised to him and the heirs male of his body, remainder to his own right heirs, by lease and release, previous to his marriage, conveyed his estate to trustees, to the use of himself for life, remainder to the use of his intended wife for life, remainder to his first and other sons in tail male. The marriage took effect, and they had issue a son: nineteen years afterwards the husband suffered a common recovery, and declared it to be to the use of A. B. and his heirs, in trust to sell the premises for the payment of his debts. A. B. sold the lands for the payment of the debts, according to the trust reposed in him; the tenant in tail died, and his son claimed the lands. The Court were unanimously of opinion, that the recovery enured to the uses of the settlement, and therefore that the purchaser had no title.

7. The principle that a common recovery shall operate as a confirmation of any preceding incumbrances created by the person who suffers such recovery, is founded in natural justice, which forbids men to defeat their own contracts. But where a tenant in tail, with the reversion in fee in himself, creates incumbrances, and his son (on whom the estate tail and reversion in fee descends) suffers a recovery, it will not, like a fine, operate so as to let the rever-

Tit 35. c. 12. § 9.

sion into possession, and thereby make it liable to the debts of his father; because the operation of a recovery is to destroy all remainders and reversions expectant on the estate tail, and the fee acquired by the recoveror proceeds out of the estate tail. It follows, that where a person is tenant in tail by descent, with the reversion in fee in him also by descent, he ought never to bar his estate by fine only, but ought also to suffer a common recovery, which will effectually prevent the estate thus acquired from becoming liable to the debts or contracts of his ancestor.

Is a Revotion of a Devise. Tit. 38. c. 6.

8. A common recovery operates as a revocation of a prior devise of the lands, whereof the recovery is suffered, upon the same principle that a fine has that effect.

Creates a Forfeiture in some Cases. Pelham's Case, 1 Rep. 15.

9. A common recovery suffered by a tenant for life wherein he is vouched, without the concurrence of the person in remainder, operates as a forfeiture of the estate for life, in the same manner as if he had levied a fine. This doctrine was deduced from the common law; for if a demandant in a real action recovered against a tenant for life by default, or *nient dedire*, or by pleading covinously, to the disherison of the person in reversion, the tenant for life forfeited his estate, for he was intrusted with the freehold, and was to answer the *præcipes* of strangers, and to defend his own, as well as the reversioner's estate; so that when he gave way to the demandant's action, or vouched a stranger, he admitted the reversion to be in such demandant or stranger; and consequently denied the tenure of the reversioner, which was a forfeiture.

1 Inst. 35 *b.* 252 *a.*

10. If a person is tenant for life, with an estate in remainder in tail in himself; he may in that case suffer a common recovery, without incurring a forfeiture.

Smith v. Clifford, 1 Term Rep. 738.

11. One Richards being tenant for life, with remainder to his first and other sons in tail, remainder to the heirs of his body. Richards conveyed his estate by lease and release to a third person to make him tenant to the *præcipe*, and suffered a recovery. The question was, whether this recovery operated as a forfeiture. The Court was of opinion that the recovery did not operate as a forfeiture. That the passage in 1 Inst. 35 *b.* could only be understood of a bare tenant for life who took upon himself to do an act inconsistent with the nature of his estate, and which before the statute of 14 Eliz. would have displaced the remainders. The forfeiture of his estate was therefore a proper punishment upon him for attempting to do an act inconsistent with his tenure, and calculated to injure the person in reversion. But the law will never punish a man for doing that which is not inconsistent with the nature of his estate, and which may have a legal operation. Such was this case, for Richards stood in two several characters, that of tenant for life, with a remainder in tail subsequent to that limited to his first and other sons. This remainder in tail was all that he sought to bar; and the law says, that having the immediate freehold, and an estate tail in remainder in him, he has a right to bar it. The next thing then was, whether the recovery itself would operate so as to subject him to a forfeiture; and as to this, the Court were unanimously of opinion that it did not, because there was a legal subject for it to work upon, namely, his remainder in tail. Richards was vouched and entered into the warranty, not in respect of his tenancy for life, but of his remainder in tail; and the recompence in value is supposed to go to those who would have been entitled to his estate tail, and those who stood subsequent to them, and passed over his

first and other sons, who had the first estate tail in them: and as they received no recompence, their estate was not displaced or in any manner affected by the recovery.

Vide ante, Meredith v. Leslie, S.P. c. 7.

12. It has been stated, that where a fine is levied, or a recovery suffered of lands held *ex parte materna*, and the use is not thereby altered, the mode of descent will not be changed.

Does not alter the Descent. Tit. 29. c. 3.

A. being seised in right of his wife of lands which she had by descent on the part of her mother; the husband and wife covenanted to levy a fine, which was thereby declared should be to the use of the cognizees and their heirs, to make them tenants to the *præcipe*, in order to suffer a common recovery; and afterwards such recovery was suffered accordingly; which by the same deed was declared should enure to the use of the said A. for his life, remainder to his wife for her life, remainder to the first and other sons of their two bodies in tail male, remainder to the right heirs of the wife.

Abbot v. Burton, 11 Mod. 181.

A. and his wife died without issue; and the question was, whether the lands should descend to the heir of the wife on the part of the mother or on the part of the father.

Lord Ch. J. Trevor delivered the opinion of the Court. He said, that in arguing the case it had been insisted on, that there was a difference between a use resulting by implication of law, and a use limited by express words; but they were to consider how this point stood before the statute of uses. Before that statute the law considered the estate of the land, and the use of the land, as two distinct things; and therefore before that statute if a man had made a conveyance, either by deed of feoffment, or any other legal conveyance, he might therein, by express limitation, have declared the use

of the land; or if there were no express limitation, the law gave it back to him again; for he was not to pass away the pernancy of the profits without some consideration or estoppel by express limitation; so that a man might at common law have separated the use and the estate; for though the use and the pernancy of the profits were neither created nor guided by the common law, yet the law took notice of them, and the *cestui que trust* had a remedy by *subpœna;* so that the use was taken notice of as distinct from the land, even at common law. Then came the statute 27 Hen. VIII. c. 10.; and what alteration that made was to be considered. That statute executes the possession of the land, in the same plight and manner as the use was before; therefore, as the conveyance was here, the ancient use which resulted back was not a new use, for it must have been an old use, if it resulted back as not disposed of, and so much of the ancient use as was undisposed of. Now if the use would have gone this way before the statute, it would still go the same way since the statute. It was the same thing whether the ancient use came back by implication of law, or by limitation of the party; for that the construction of law was founded on a supposal of the intention of the parties, and would convey and carry the use the same way as it was supposed the party would have done. Now if the law were so in the case of a resulting use, which arises by implication of law, what reason was there why it should have a different construction where there was an express declaration of the party; especially since that declaration made no alteration of the estate, and the other use limited to A. and his wife was only a new interest, arising out of the conveyance, because it was not so large an estate as the fee was before. But

where the limitation was in fee, it made no alteration, because the one was as large as the other; and it was still the same residue remaining in the wife, which she had not disposed of before; that was a part taken out of the whole, and of the same nature as the other was: and this appeared so, not only from the reason of the thing, but there were other authorities also which seemed to settle this point. And it was all one whether this ancient use in fee was created by implication of law, or by express limitation of the party, if it were of the same estate. In the case of Godbolt v. Freestone, these authorities were held to be good. A difference had been made between this case and that one, namely, that this was not an immediate conveyance, as a feoffment to a person in fee; but that here there was a covenant to levy a fine, which was to be to the use of the conusees and their heirs, with an intent to have a common recovery; and hereupon the chief objection was, that not only the legal estate, but also the use, passed to the conusees, both in law and equity; so that when a recovery was suffered, the use in fee must arise out of the estate of the conusees. This carried the case a step farther than that of Godbolt v. Freestone; and it was fit he should give an answer to it. Now this opinion seemed to him to be grounded on taking the common recovery in a wrong sense; for this fine and recovery might be taken as two distinct conveyances, and taking it as such, it was subject to this objection. But as it might be taken as two several, it might as well be taken as one single conveyance; and the deed, the fine, and the recovery might well be taken as several parts of one and the same conveyance, which was the case in question, and easily resolved: for where such a conveyance was made by deed, fine, and common reco-

Tit. 29. c. 3. § 48.

very; though the estate did move from one to another (as conduits), yet the estate originally moved only from the conusor, and the estate was always in a manner in him; as if the estate were declared to one for life, remainder in tail, and no limitation of the use in fee, the use will result back to the conusor, and not go to the conusee or recoverors. And so if there be a limitation of the use of the fee, that use shall and must arise out of the estate of the conusor, and not out of the estate of the recoverors.

Tit. 11. c. 4. § 21.

Judgment was given for the heir *ex parte materna*; and consequently that the recovery did not alter the estate.

Exception.

13. If a tenant in tail by purchase under a marriage settlement made by his maternal ancestor, with the reversion in fee by descent *ex parte materna*, suffers a common recovery, to the use of himself in fee, the estate will descend to his heirs *ex parte paterna*; because the fee acquired by the recovery will descend in the same manner as the estate tail acquired by purchase from the maternal ancestor; that is, to his paternal heirs.

Martin v. Strachan, 1 Stra. 1179. 1 Wils. Rep. 66. 5 Term Rep. 107. note. Willes R. 444.

14. Thus, where John Tregonwell, being seised in fee of the lands in question, upon the marriage of Mary his eldest daughter with Francis Luttrell, by indenture executed in the year 1680, covenanted to levy a fine, and suffer a recovery, to the use of himself for life, remainder to Francis Luttrell for life, remainder to his daughter Mary for life, remainder to the first and other sons of the said Mary by the said Francis Luttrell, remainder to the first and other sons of the said Mary by any other husband, with remainder to his own right heirs in fee. A fine was levied, and a recovery suffered, to the uses of this indenture.

On the death of Francis Luttrell without issue male, the said Mary married Sir Jacob Banks, and had issue by him a son named Jacob, who, on the death of his father and mother, became seised of an estate tail in the said premises, and of the reversion in fee *ex parte materna*, and in the year 1725 suffered a common recovery in the usual form, having by a deed of bargain and sale enrolled made a tenant to the *præcipe*, and declared by the same deed, that such recovery should be and enure to the use of himself and his heirs, and died without issue. Upon the death of Jacob Banks, John Strachan entered into the lands in question, as heir *ex parte paterna*, and Thomas Tregonwell brought an ejectment against him, claiming those lands as heir to the said Jacob Banks, *ex parte materna*. The question was, whether this recovery did or did not operate as a new purchase, and thereby alter the descent? The Court of King's Bench was of opinion that this recovery altered the nature of the estate, and made it descendible to the heirs *ex parte paterna*.

A writ of error was brought from this judgment in the House of Lords; and on behalf of the plaintiff in error, who claimed *ex parte materna*, it was argued that the rule of law is clear, that the estate of one dying seised by descent *ex parte materna*, can descend to none but the heir *ex parte materna*; it being founded on natural justice, that an estate should go to the blood and family from whence it came, and where the owner himself has not thought fit to give it away from them: that this estate was originally the inheritance of Jacob Banks's mother and her ancestors; and therefore, if there had been no interruption in the course of descent, it must now descend to the plaintiff: that the only interruptions insisted on were

6 Brown Parl. Ca. 319.

the settlement of 1680, and the recovery and deed of uses in 1725. As to the former, it was only a temporary interruption of the possession, by the particular or partial estates carved out of the fee, the inheritance being still left to descend *ex parte materna*; and whenever those particular estates should determine, whether by the death of the parties, or by bar or extinguishment of them, the possession would return to the old inheritance again: and as to the latter, the recovery and deed of uses only determined and barred the particular estates, and consequently let the fee into possession, in the same condition and quality as when in reversion, and therefore could not alter the nature of the ancient use, or the descendible quality of it: that this is clearly the case where a fine is levied by tenant in tail, who has the reversion in fee in himself, it having been settled, that such a fine extinguishes the estate tail, and lets the old reversion into possession; nor is there any material difference between a fine and a recovery; for, so far as their respective powers reach, they are both universally held to be bars of the particular estates, and conveyances of their own inheritance in fee. It is objected, that a recovery not only bars the estate tail but the remainders also. But that distinction is totally immaterial, because it affects only the extent of the bar or extinguishment, not the manner in which those instruments operate; it proves the recovery to be a bar or extinguishment of the estates tail, both in possession and remainder, but does not prove it to be less a bar or extinguishment of either; and the bar or extinguishment of both, by the recovery, as much lets in the reversion in fee after both, as a bar or extinguishment, by fine of one, lets in the reversion in fee dependent on that one only: that this distinc-

tion could not be applicable to the case of a recovery by tenant in tail, with an immediate reversion in fee to himself; and it would be extremely difficult to maintain, that in such a case the use would be the old one, and go *ex parte materna;* but that in the present case, it was a new one, only, because there was an intermediate remainder in tail, which was equally, and but equally, barred with the estate tail in possession; or if that should be admitted to be no material point of distinction, it would be as hard to maintain, that if tenant in tail, with reversion in fee in himself, descending *ex parte materna,* bars the estate tail by fine, the resulting or declared use in fee to himself, would be the ancient use, and go *ex parte materna;* but that if the same tenant in tail bars the same estate tail by a recovery, the resulting or declared use would be a new use, and go *ex parte paterna:* that it was apprehended no case could be cited to warrant this distinction; and if not, reason and equity pointed out that they ought both to have the same effect.

It is also objected, that a recovery is the proper conveyance of a tenant in tail, with remainder over, and therefore operates as a grant from him; and that the recoveror comes in under him, in the *per,* as his grantee, and therefore as a purchaser. But this would be, to make the recovery operate, not as a bar to the particular estates tail in possession and remainder, which is the sense and language of all the books, but as a bar to his own reversion in fee, which is absurd; nor indeed is a recovery, in any other sense, a grant from the tenant in tail, than as it is a common assurance, by which he may bar those particular estates, and acquire or convey the fee simple in possession: but it is not less such an acquisition, if he gets it by

barring the particular intermediate estates, and letting his own fee into possession, than if it could be said to be a grant of the estate tail itself to himself in fee. But whatever might be the case, where the estate tail in possession, together with the remainder or reversion in others, include the whole inheritance, yet where the tenant in tail in possession has also the reversion in fee, the recovery operates as a conveyance of the reversion, and a bar to the intermediate estates. A recovery is not a sort of conveyance more proper to bar remainders, than a fine is to bar an estate tail alone; nor can the recoveror come more under the tenant in tail, or his estate, or be more properly a grantee from him of his estate tail, than the conusee of a fine is under the conusor; and yet, in this latter case, that notion clearly does not prevent the estate tail from merging in the fee. It is, however, further objected, that the estate tail is continued and enlarged by the recovery; but this is at best a very inaccurate manner of speaking, if not unintelligible or absurd, since an estate tail cannot continue longer than the issue *per formam doni*; and a fee simple cannot with any propriety be called an enlarged estate tail. The only reasonable sense of such expression, is, that the tenant in tail, by exercising the power which the law has given him, of barring the estates tail, has become possessed of the absolute fee in possession; but in this sense it is no otherwise an enlargement of his estate, than a surrender of the tenant for life to the remainder-man in fee, is an enlargement of the remainder-man's estate, and is therefore more properly an enlargement of the fee simple, by sinking the particular estate, than an enlargement of the particular estate, which is absolutely destroyed; nor does this manner of con-

sidering the recovery in the least injure the absoluteness of that power which the law gives the tenant in tail over the estate, because he acquires as much this way as the other, with this advantageous circumstance, that it keeps the estate in its natural channel, and prevents the act done for one purpose only, from enuring to another, which the party never thought of, and which, if he had, he might, and probably would have avoided.

In support of the judgment it was contended, that Jacob Banks being tenant in tail, under the settlement of 1680, by purchase, and not descent, the rule of descent, relied on by the plaintiff in error, was only applicable where the person, whose estate is in question, was at the time of his death seised by descent, and no way affected or influenced the present question, if Jacob Banks acquired the fee by suffering a recovery, as tenant in tail by purchase: that a tenant in tail is considered in law as possible owner of the whole fee, viz. that the remainders and reversions are in his power by suffering a recovery, which is the act of tenant in tail, and takes its effect out of the estate tail, in right of which alone he is empowered to suffer such recovery, as he thereby acquires, in judgment of law, an absolute and pure fee against the remainder-men and reversioner, although the reversion were in a stranger; whereas, by a fine, the estate tail is only extinguished, and barred, as against the issue in tail; but, as to the remainder-men, or reversioner, it subsists, notwithstanding that act, as a base or determinable fee, on failure of issue: it was therefore apprehended, that by the recovery, which removed all restraints and limitations ensuing or dependent after the estate tail, the fee so acquired by Jacob

Banks proceeded out of the estate tail, and took its effect to the use of the person so enabled in law to suffer the same, as the result of his power, in virtue of the estate tail, which was gained by settlement (*i. e.*) by purchase; and consequently the remainders and reversions which subsisted before the recovery were alike extinguished, and put to an end, by force and operation of such recovery: that if the estate tail, as to the issue only, is considered as barred by a recovery, and the old estate in fee or reversion, subject to the estate tail, is let in, and takes place, as contended for by the plaintiff, the consequence and inconvenience thereof would be, that in that case every estate in the kingdom, of which a recovery is suffered by a tenant in tail, seised also of the reversion in fee, would still remain liable as assets by descent to the specialty debts of the ancestor from whom it descended (for the estate tail, while it subsists, and the base fee, gained by force of a fine, suspends the remedy, so long as there is issue, and therefore preserves the debts); and this form of conveyance, invented and long used to strengthen the title of possessors who are tenants in tail, would be a means of destroying such intention, and would revive old demands, to the ruin of many families.

After hearing counsel on the writ of error, the Judges (who attended according to order) were directed to deliver their opinions on the following question, viz. "Whether, upon the death of Jacob Banks, the estate in question did by law descend to his heir on the part of the mother or not?" And the Judges, having taken time to consider, the Lord Chief Justice of the Common Pleas delivered their reasons at large, and concluded with their opinion,

"That the estate in question, upon the death of Jacob Banks, did not descend to his heirs on the part of the mother." Whereupon it was ordered and adjudged, that the judgment given in the Court of King's Bench should be affirmed.

TITLE XXXVI.

RECOVERY.

CHAP. X.

What Persons, Estates, and Interests are not barred by a Recovery.

1. *Persons who are not Parties.*
3. *Estates precedent to that of which a Recovery is suffered.*
7. *Estates in Dower or Jointures.*
33. *Estates held* Jure Uxoris.
41. *Estates Tail granted by the Crown for Services.*
55. *Reversions vested in the Crown.*
59. *Estates held by* Elegit.
60. *Executory Devises.*

SECTION 1.

Persons who are not Parties.

NO persons are barred by a common recovery but those who are parties to it, and the issue in tail, the remainder-men, and reversioners, and persons claiming under conditional limitations expectant on, or to take effect after estates tail.

Pigot, 67.

2. Thus if lands are given to a husband and wife, and the heirs of the body of the husband, remainder over, and the husband alone suffers a common recovery, in which he comes in upon the voucher, and vouches over; such recovery will bar the estate tail, and the remainder over; but will not bar the wife's estate, because she is not a party.

Estates precedent to that of which a Recovery is suffered.

3. No estates or interests are barred by a common recovery, but those which are subsequent, in point of limitation, to the estate of which the recovery is suffered; for all interests precedent remain as they were before.

4. Thus, although a recovery be a good bar to a remainder for years, limited to commence after the determination of an estate tail; yet if such term be limited to arise before the estate tail, it will not be barred by a recovery suffered of the estate tail. Pigot, 137.

5. A. being tenant for life, remainder to B. in tail, B. made a lease for years, to commence after the death of the tenant for life. The tenant for life afterwards suffered a common recovery, in which the remainder-man in tail was vouched: and it was determined that the term for years was not barred by the recovery, but that the lessee might falsify it. Pledgard v. Lake, Cro. Eliz. 718. Dyer, 51 *b.* in Mar. Poph. 5.

6. If a person is tenant for life, with remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his daughters as tenants in common in tail, remainder over; and having a daughter, he joins with her in suffering a common recovery; it will be good against the tenant for life, and his daughter, and the remainder-man; but the estates tail limited to the first and other sons, being prior to the estate of the daughter, and being supported by the limitation to the trustees, will not be affected by the recovery. 1 Inst. 204 *b.* note.

7. It was formerly a practice for women, having estates in dower, or jointures, to alienate them by fine or recovery; and so give them away from their husband's family. To prevent this practice, a statute was passed, 11 Hen. VII. c. 20, by which it was enacted, "That any woman who had any estate in dower, or for term of her life, or in tail, jointly with her husband, or only to herself, or to her use, in any manors, &c. of the inheritance or purchase of her husband, or given to the said husband and wife in tail, or for term of life, by any of the ancestors of the said husband, or by any other person Estates in Dower or Jointures. 1 Inst. 326 *b.*

seised to the use of the said husband or of his ancestors, and shall hereafter, being sole, or with any after-taken husband, discontinue, alien, release, or confirm with warranty, or by covin suffer any recovery of the same; that all such recoveries, discontinuances, &c. shall be utterly void and of no effect; and it shall be lawful for the person in remainder or reversion to enter immediately."

Tit. 35. c. 9. § 8.

§ 2.

9. In the statute 32 Hen. VIII. c. 36. by which tenants in tail were enabled to bar their issue by fine, is the following clause: "Provided always, that this act, nor any thing herein contained, shall extend to bar or exclude the lawful entry, title, or interest of any heir or heirs, person or persons, in or to any manors, &c. by reason of any fine or fines levied by any woman after the death of her husband, contrary to the intent of the statute 11 Hen. VII., of any manors, &c. of the inheritance or purchase of the said husband, or of any of his ancestors, assigned to any such woman in dower, for term of life or in tail.

Wimbish v. Tailbois, Plowd. 42.

10. These statutes having been made to prevent an injury, have always been construed liberally; and therefore every kind of estate created by the fine or recovery of a jointress, of lands held by her as a jointure, is void against the heir of the husband.

Pigot v. Palmer, Moo. 250. 3 Rep. 51 *b.* Jenk. 275. 2 Leon. 168. 3 —— 78.

11. Thus where a tenant in tail, who was a jointress within the stat. 11 Hen. VII., accepted a fine *sur cognizance de droit come ceo*, &c. from a stranger, who granted and rendered the lands to the jointress for 100 years; it was adjudged that this was a forfeiture; for otherwise the intention of the statute might, by practices of this kind, be entirely defeated.

12. With respect to the estates which have been deemed to be comprehended within this act, the same liberality of construction has been adopted;

and therefore it has been determined, that whenever an estate has been derived, either from the husband himself, or from any of his ancestors, it is protected by these statutes.

13. Thus where the ancestor of the husband made a feoffment in fee, upon condition that the feoffees should reconvey to the husband and wife in tail. This was adjudged to be such an estate as was intended by the statute. Anon. Moo. 93. pl. 231. 3 Rep. 50 *b.* Cro. Eliz. 513.

14. So where a man and a woman, being joint tenants in fee simple of a manor, intermarried, and afterwards levied a fine thereof to a stranger, who rendered it to them in tail. After the death of the husband, the wife married again, and she and her second husband levied a fine of it. The Court held that the fine was void, as to the moiety which had originally been the estate of the husband, because it was protected by this statute. Laughter v. Humphrey, Cro. Eliz. 524.

15. In the same manner where one brother, in consideration of a marriage had between his brother and M., covenanted to stand seised to the use of himself for life, and after to the use of his brother and his wife, for their lives; this was adjudged to be a jointure within the statute 11 Hen. VII., as moving from the ancestor of the husband. Sharrington v. Strotton, Plowd. 300.

16. Although lands are settled in consideration of money paid by the wife or her friends; yet if the marriage appears to have also constituted a part of the consideration, the estate will then be considered as within the statute 11 Hen. VII.

17. Thus, where a grandfather bargained and sold lands to J. N. for thirty years, remainder to himself and his wife for life, remainder to his son for life, remainder to his grandson and one S., the daughter of J. N., and the heirs of their two bodies begotten; Villars v. Beaumont, Dyer, 186 *a.* Bendl. 29. Keilw. 208 *a.* Moo. 93. p. 231.

Vide infra, Kirkham v. Thompson, S. P.

after which followed these words: "for the which manor, bargain, and other the premises, the said J. N. covenants to pay the said sum of 70*l.* at certain days, &c." The son afterwards married S., who survived him, and with a second husband levied a fine of those lands. The jury further found, *dehors* the indenture, that the indenture and bargain and sale were as well in consideration of the marriage as of the money. It was held by three Judges against Dyer, that the fine was void; for they expounded the words "given by the ancestors, &c." to be any lands assured to the woman in jointure, either for money (as few marriages are made without it), or else freely.

Vide Copland v. Platt, Sir W. Jones, 254. Cro. Car. 244. Jenk. 310.

2 Vern. 489. 1 Ab. Eq. 220.

18. A trust estate, or an equity of redemption, is within the statute 11 Hen. VII. as well as a legal estate; for uses are expressly mentioned in that statute; and a trust is now what a use was then.

19. With respect to the estates which are not comprehended within the statute 11 Hen. VII., as the object of it was only to prevent women from alienating those lands which were settled on them by their husbands, it therefore does not extend to any lands which were originally the property of the wife, or which were derived from any of her ancestors.

Eyston v. Studd, Plowd. 463. 1 Inst. 366 *a*.

20. Thus, where husband and wife, seised of lands in right of the wife, levied a fine *sur cognizance de droit come ceo*, and took back an estate to the husband and wife in tail general, remainder to the heirs of the wife. The husband died, leaving issue a son; the wife married a second husband, with whom she joined in levying another fine; on which the son by the first husband entered for a forfeiture by the 11 Hen. VII. It was determined that the last fine was no forfeiture by this statute; for as the estate was originally the property of the wife, it

would be unreasonable to restrain her from disposing of it, and quite foreign to the intent of the act; for although it might, within the letter of the act, be considered as the purchase of the first husband, by the first fine, yet it was not so in reality, as the lands were originally derived from the wife.

21. Husband and wife sold lands which were the estate of the wife, and purchased other lands with the money, which were settled on the husband and wife in tail. This was agreed *arguendo* to be a jointure within the statute, because the money was a chattel vested in the husband, which he might have disposed of as he pleased; and therefore when he laid it out in the purchase of lands, the law will consider them as purchased by the husband. Palmer, 217.

22. A voluntary gift by a stranger to a husband and wife, is not within this statute.

23. The bishop of Exeter made a voluntary gift of lands to one Turner his servant and Sybill his wife, and to the heirs of their two bodies. The husband died, and the wife levied a fine of those lands. It was resolved that this was not a jointure within the statute 11 Hen. VII.; for the lands did not come from the husband, nor from any of his ancestors. Ward v. Walthew, Cro. Jac. 173. 1 Brownl. 137. Yelv. 101.

24. If lands are limited by a husband, or by any of his ancestors, to the wife in tail general, without any limitation to the issue or heirs of the husband, such estate is not protected by the stat. 11 Hen. VII.; because the object of that statute was to prevent wives from prejudicing the issue or heirs of their former husbands; but where no remainder is limited to such persons, no prejudice can be done to them.

25. Thus, where a man seised in fee devised lands to his wife in tail general, remainder over to a stranger; after the husband's death, the wife Foster v. Pitfal, Cro. Eliz. 2. Idem. 524. 1 Leon. 261.

Hughes v. Clubb, Com. R. 369.

married a second time, and suffered a recovery. The daughter of the first husband entered for the forfeiture. But it was determined, that although this case was within the letter of the statute, yet it was not within the intention of it, the remainder being limited from the heirs of the husband to a stranger.

4 Rep. 3 *b*.

26. A jointure limited to a woman in fee is not within the statute 11 Hen. VII. for the same reason.

27. These statutes were originally construed to extend to a fine levied by the husband and wife; for

Harley v. West, 1 Inst. 365 *b*.

Lord Coke has stated a case where a man seised of lands in fee, levied a fine to the use of himself for life, and after to the use of his wife, and of the heirs male of her body by him begotten, for her jointure, and had issue male; afterwards he and his wife levied a fine, and suffered a common recovery. The husband and wife died; the issue male entered by force of the statute 11 Hen. VII.; and it was holden by the justices of assize, that the entry of the issue male was lawful.

28. The doctrine laid down in the above case has however been contradicted by a more modern determination.

Kirkman v. Thompson, Cro. Jac. 474. Pigot, 81.

29. A father, in consideration of the marriage of his son, and of 200*l.* portion, covenanted to convey lands to the use of the son and his wife, and of the heirs of the body of the wife, remainder to his own right heirs. A conveyance was made accordingly, and the husband and wife joined in levying a fine of the lands. It was resolved, first, that this was a jointure within the intent of the statute, although part of

Simpson v. Turner, 1 Ab. Eq. 220.

the consideration was money paid by the father of the wife to the father of the husband. 2dly. That the fine did not operate as a forfeiture, either within the words or intention of the statute; for the wife was not

sole, nor was the alienation with an after-taken husband; and the object of the statute was only to provide against the disherison of the heirs of the husband contrary to his intention.

30. The right of entry which is given by the stat. 11 Hen. VII. is not confined to the heir of the husband, but is extended to the person to whom the inheritance is to go after the decease of the woman, whether he be the heir of the husband, or a stranger deriving under the heir of the husband.

31. Thus, where Sir Richard Bridges made a feoffment of lands to trustees, on condition that they should give back the same to him and his wife, and to the heirs of their two bodies begotten, remainder to the right heirs of Sir Richard, which was accordingly done. Sir Richard had issue by his wife a son, named Anthony, and died. Anthony, in the lifetime of his mother, conveyed the lands by fine to Sir G. Browne in fee; the wife afterwards made a lease for three lives, not warranted by the statute 32 Hen. VIII., whereupon Sir G. Brown entered; and the question was, whether his entry was lawful within the statute 11 Hen. VII. It was resolved that the entry of Sir G. Brown was lawful, because he was the person who had the immediate right to the inheritance after the death of the wife.

Brown's Case, 3 Rep. 50. Lynch v. Spencer, S. C. Cro. Eliz. 513.

32. By the 8th and 9th sections of the statute 11 Hen. VII. it is provided, that it shall not extend to any recovery to be had with the heirs next inheritable to the woman; or where the person next in remainder consents to the same; provided such consent appear on record.

Lincoln Col. Case, 3 Rep. 58.

33. By the common law, if a husband seised of lands in right of his wife, had levied a fine of them

Estates held Jure Uxoris. 1 Inst. 326 *a.*

without her concurrence, it operated as a discontinuance; by which means the wife was barred of her entry, after the death of her husband, and was obliged to bring her writ of *cui in vita*: and therefore, Littleton says, the Judges would not permit a man to levy a fine alone of his wife's estate.

§ 731.

34. This produced a clause in the stat. 32 Hen. VIII. c. 28. § 6. by which it is enacted, "That no fine, feoffment, or other act or acts thereafter to be made, suffered, or done by the husband only, of any manors, &c. being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be or make any discontinuance thereof, or be prejudicial or hurtful to the said wife, or to her heirs, or to such as shall have right, title, or interest to the same, by the death of such wife or wives: but the same wife and her heirs, and such other to whom such right shall appertain, after her decease, shall and may then lawfully enter into all such manors, &c.; any such fine, feoffment, or other act to the contrary notwithstanding; fines levied by the husband and wife, whereunto the said wife is party and privy, only except."

1 Inst. 326 *a.* Greneley's Case, 8 Rep. 71. Beaumont's Case, 2 Inst. 681. Rep. 139.

36. This act having been made to suppress a wrong, and to give the injured party a more speedy remedy than what the common law afforded, it has been construed liberally. So that where lands were given to a husband and wife, and the heirs of their two bodies, and the husband alone levied a fine thereof, and died; the entry of the wife was adjudged to be lawful; although the words of the act are, "being the inheritance or freehold of the wife;" whereas in this case the lands were as well the inheritance and freehold of the husband as of the wife.

37. Where husband and wife are joint purchasers in tail, remainder to the wife in fee, and the husband alone levies a fine, and dies, this is an alienation within the statute. Dyer, 162. pl. 48.

38. Lord Coke says, if a husband cause a *præcipe quod reddat* upon a feint title to be brought against him and his wife, and suffers a recovery without any voucher, and execution is had against him and his wife, yet this is helped by the statute; for this is the act of the husband, and the words of the statute are, "made, suffered, or done." 1 Inst. 326 *a.*

39. Although the King be not named in this act, yet he is bound by it as well as a subject. So that if a husband alone levies a fine of his wife's land to the King, still the wife may enter after the death of her husband. 2 Inst. 681.

40. If the wife dies before entry, her issue may enter; and if she has no issue, then the person in remainder or reversion may enter, by the very words of the statute. 1 Inst. 326 *a.*

41. When recoveries were established as common assurances, the Judges held that every kind of estate tail, whether created by a subject or by the Crown, was barrable by a common recovery; as also all such remainders over, and reversions, as were vested in any private persons. And even where the ultimate reversion was vested in the Crown, it was fully established that a common recovery would bar the issue in tail, and all intermediate remainders between the estate tail and the reversion vested in the Crown: for otherwise a perpetuity might have been created, by limiting the ultimate reversion to the Crown. Estates Tail granted by the Crown for Services. Dyer, 32 *a.* Wiseman's Case, 2 Rep. 15.

42. By the stat. 34 & 35 Hen. VIII. c. 20. reciting that where divers of the King's progenitors, and especially the King himself, had given and granted,

or otherwise provided to his and their subjects, manors, &c. to them and to the heirs male of their bodies, or to the heirs of their bodies; minding at the time of such gifts not only to prefer and advance presently the donees, but also their heirs in blood of their bodies, according to the limitations of the said gifts, to the intent that recompence for the service of such donees should not only be a benefit for their own persons, but a continual profit and commodity to and for their heirs coming of their bodies, whereby such heirs should have in special memory and daily remembrance the profit that they had and took by the service of their ancestors, done to the kings of the realm, and thereby be the better encouraged to do like service to their sovereign lord. And forasmuch as sundry such donees in tail and their heirs had suffered, and daily suffered, by their consents, untrue and feigned recoveries to be had against them with common voucher or otherwise of manors, &c. so given, granted, or provided in tail, by the King or his progenitors as aforesaid, to the intent by fraud, covin, and untrue means, not only to bind and defeat their heirs, inheritable by the limitation of such gifts, whereby questions and diversities of opinions had risen, whether such feigned and untrue recoveries against such tenants in tail, by their own consent, of lands, &c. whereof the reversion or remainder was in the King, at the time of such recoveries had, should, after the death of the tenant in tail, bind the heirs in tail or not.

43. It is enacted by the second section of this statute, "That no such feigned recovery thereafter to be had by assent of parties against any such tenant or tenants in tail of any lands, &c. whereof the reversion or remainder, at the time of such

recovery had, shall be in the King, shall bind or conclude the heirs in tail, whether any common voucher be had in any such feigned recovery or not; but that after the death of every such tenant in tail, against whom any such recovery shall be had, the heirs in tail may enter, have, and enjoy the lands, &c. according to the form of the gift of entail; the said recovery, or any other thing or things to be had, done, or suffered by or against any such tenant in tail, to the contrary notwithstanding."

And it is further enacted by the third section of this statute, "That the heirs of every such tenant in tail, against whom any such feigned recovery shall be had, shall take no advantage for any recompence in value against the voucher, nor his heirs."

44. Lord Coke has observed, that in the construction of this statute, the Judges have laid down the ten following rules: "1st. The estate tail must be created by a king, and not by any subject, albeit the king be his heir to the reversion; for the preamble speaks of gifts made to subjects, and none can have subjects but the King; and also in the preamble it is said, (for service done to the kings of the realm), and the body of the act referreth to the preamble, and therefore if the Duke of Lancaster had made a gift in tail, and the reversion descended to the King, yet was not that estate tail restrained by that statute, and so of the like. 2dly. If the King grant over the reversion, then a recovery suffered will bar the estate tail, because the King had no reversion at the time of the recovery. 3dly. If the King make a gift in tail, the remainder in tail, or grant the reversion in tail, keeping the reversion in the Crown, a recovery against tenant in tail in possession shall neither bar the estate tail in posses- 1 Inst. 372 *b.*

sion by the express purview of the statute, nor, by consequence, the estate in remainder or reversion, for that the reversion or remainder cannot be barred, but where the estate tail in possession is barred. 4thly. If a subject make a gift in tail, the remainder to the King in fee, albeit the words of the statute be (whereof the reversion or remainder of the same, &c.) yet seeing the estate in tail was not created by a king, as hath been said, the estate tail may be barred by a common recovery. 5thly. If Prince Henry, son of Henry VII., had made a gift in tail, the remainder to Henry VII. in fee, which remainder, by the death of Henry VII., had descended to Henry VIII., so as he had the remainder by descent, yet might tenant in tail, for the cause aforesaid, bar the estate tail by a common recovery. 6thly. The word (remainder) in the statute is no vain word, for the words of the preamble be, the King hath given or granted, or otherwise provided, to his servants and subjects. The word (reversion) in the body of the act, hath reference to these words (given or granted) and (remainder) hath reference to these words (otherwise provided), as if the King, in consideration of money, or of assurance of land, or for other consideration by way of provision, procure a subject, by deed indented and enrolled, to make a gift in tail to one of his servants and subjects, for recompence of service or other consideration, the remainder to the king in fee, and all this appear of record; this is a good provision within the statute, and the tenant in tail cannot by a common recovery bar the estate tail: so it is if the remainder be limited to the king in tail; but if the remainder be limited to the king for years, or for life, that is no such remainder as it is intended by the statute, because it is of no re-

mainder of continuance, as it ought to be, as it appeareth by the preamble; and it ought to have some affinity with a reversion, wherewith it is joined. 7thly. Where a common recovery cannot bar the estate tail, by force of the said statute, there a fine levied in fee, in tail, for lives, or years, with proclamations according to the statutes, shall not bar the estate tail, or the issue in tail, where the reversion or remainder is in the king, as is aforesaid, by reason of these words in the said act (the said recovery, or any thing or things hereafter to be had, done, or suffered, by or against any such tenant in tail to the contrary notwithstanding), which words include a fine levied by such a donee, and restraineth the same. 8thly. But where a common recovery shall bar the estate tail, notwithstanding that statute, there a fine with proclamations shall bar the same also. 9thly. Where the said latter words of the statute be (had, done, or suffered by or against any such tenant in tail), the sense and construction is, where tenant in tail is party or privy to the act, be it by doing or suffering that which should work the bar, and not by mere permission, he being a stranger to the act, as if tenant in tail of the gift of the king, the reversion to the king expectant, is disseised, and the disseisor levy a fine, and five years pass, this shall bar the estate tail *: and so if a col-

* The only authority quoted by Lord Coke in support of this position, is the case of Stratfield v. Dover, Trin. 39 Eliz. which is reported in 1 Cro. 595. 612. but no judgment was given on this point; and Justice Walmsley observed, that if such a doctrine were admitted, it would be a common mischief, for then tenants in tail of the gift of the Crown might get themselves disseised, in which case a fine levied by the disseisor would bar the issue. Vide 1 Sid. 166. 1 Roll. Rep. 171.

lateral ancestor of the donee release with warranty, and the donee suffer the warranty to descend without any entry made in the life of the ancestor, this shall bind the tenant in tail, because he is not party or privy to any act either done or suffered by or against him. 10thly. Albeit the preamble of the statute extend only to gifts in tail made by the kings of England before the act, (viz. hath given and granted, &c.), and the body of the act referred to the preamble, (viz. that no such feigned recovery hereafter to be had against such tenant in tail), so as this word (such) may seem to couple the body and the preamble together; yet in this case (such) shall be taken for such in equal mischief, or in like case; and by divers parts of the act, it appeareth that the makers of the act intended to extend it to future gifts, and so is the law taken at this day, without question."

45. As this statute deprives tenants in tail of the gift of the Crown of all power of alienation, the Judges have construed it strictly; and it is observable, that an estate tail of this kind is the only perpetuity which can possibly be created without the aid of the Legislature.

Mulgrave v. Moulson, Tit. 35. c. 13.

46. Thus, where a person conveyed lands to the Crown, to the intent that the Crown should reconvey them to the same person in tail, reserving the ultimate reversion to the Crown; such an estate was held not to be within the protection of this statute.

47. Thus, where William Earl of Derby conveyed lands to trustees, to the intent that they should convey the same to Queen Elizabeth, her heirs and successors, that the Earl of Derby might accept of a grant from the Crown of the same lands, to him and the heirs male of his body, leaving the ultimate reversion in the

Johnson v. Earl of Derby, Pigot, 201. 2 Show. 104.

Crown, which was accordingly done. It was determined, that this estate tail was not within the protection of those statutes, it being a fraudulent contrivance to create a perpetuity.

48. No estate tail granted by the Crown will fall under the protection of these statutes, unless the grant appears to have been made as a reward for services.

49. Thus, where it was found by special verdict, that one William Dexter, being tenant in fee of the premises, enfeoffed Henry Earl of Derby, afterwards King Henry IV., to hold to him and his heirs. Afterwards the King, by letters patent under the duchy seal of Lancaster, 7 Hen. IV., reciting the said feoffment, and that Margaret the wife of John Milton was granddaughter and heir of William Dexter, and that Milton and his wife had petitioned the King to be fully reenfeoffed thereof; *nous voulantz cele partie soit fait ceo que loy, bone foy, et conscience demandent,* have of our especial grace given and granted to the said John Milton and Margaret his wife, and the heirs of the body of the said Margaret, the said premises, to be holden as of the King and his heirs, dukes of Lancaster, as of the duchy of Lancaster in chief for ever, with reversion to the King and his heirs, dukes of Lancaster, on failure of issue of the said Margaret. The question was, whether the entail created by the letters patent of Hen. IV., with the reversion to the King in fee, was, under all its circumstances, such an estate tail as was protected from being barred by a common recovery, by virtue of the statute 34 Hen. VIII. c. 20. It was insisted for the plaintiff, 1st. That no estate was intended to be protected by that statute but such as had been *given* or *provided* by the King in reward of some special services, because the preamble of the act speaks

Perkins v. Sewell, 1 Black. R. 654. 4 Burr. 2223.

only of estates granted upon such considerations. 2d. That this grant appeared upon the face of it to be merely a restitution of what belonged of right to the grantees; an act of justice, and not of bounty in the King, *ceo que loy, bone foy, et conscience demandent;* for which purpose it must be supposed, either that a legal title subsisted in the grantees, paramount to the title of King Henry IV., by means of some condition or defeazance annexed to William Dexter's feoffment to the Earl of Derby, or that Dexter and his heirs had an equitable right, and that King Henry IV., when Earl of Derby, was merely a feoffee to uses. To this it was answered for the defendant: 1st. That if the words of an enacting clause are wider and more extensive than the preamble, the preamble shall not narrow and confine them; that though the principal purview of the act was to protect such estates tail as were granted for services done, yet this was not the only reason. The diminution of the King's feodal rights was also expressly alleged as another reason, which would happen oftener by cutting off entails, and thereby preventing infancies and wardships. That if services were indispensably necessary to bring a grant within the protection of the statute, the law would, at this distance of time, presume them. That in the statute of fines, 32 Henry VIII. c. 36., there is the same protection of estates tail, the reversion of which is in the Crown; and *in pari materia* both statutes should be uniformly construed. That in 1 And. 140, and 1 Inst. 373, where this statute is fully explained, not a word appears to prove that services must be stated in the grant. 2d. That an entail which had lasted three hundred and sixty years under the protection of this statute, ought not now to be shaken by presumptions and conjectures. Its having been

so long unbarred, gives a presumption, that the owners knew it was unbarrable. The first attempt to alter the entail was in 1652, when there was no king in being, and all the crown lands, as well in reversion as in possession, were vested in trustees for sale; and if the reversion is once out of the Crown, the protection is gone. 3d. That there was no ground to suppose a condition or defeazance annexed to Dexter's feoffment; as the feoffment is recited, and no mention made of any defeazance or condition. 4th. That supposing the Earl of Derby a feoffee to use, which was not proved, still the grant of Henry IV. was free and gratuitous; for as the law of uses then stood, before the statute 1 Rich. III. c. 5, if the King, when a private man, was seised to an use, upon the assumption of the Crown, the use was extinguished, and the King became absolute owner of the estate. To re-grant it to the feoffor might be generous and honourable, but was (legally speaking) gratuitous. But it could not be the execution of a use, because the King only grants an estate tail, reserving the fee to himself; makes it a tenure *in capite*, and to be holden of the duchy of Lancaster, which is quite incompatible with the idea of the Earl of Derby's being merely a feoffee to uses, which must have been executed in the same plight as when the original feoffment was made.

Lord Mansfield.—"It is certain that the preamble of a statute cannot restrain the enacting part of it, where the enacting part is clearly larger than the preamble. But in this case, the estates mentioned in the enacting part, clearly refer to those in the preamble, by the word *such*, which runs through the whole. It must therefore be admitted, that in order to obtain the protection of the statute of

Hen. VIII., the estate tail must be of the *gift* or *provision* of the King, by way of reward. As for the services, which are the consideration of such gift, these must, at a distance of time, be presumed, and need not be proved. To take it out of the statute, you must show that it is not of the gift or provision of the King. And, in the present case, it is plainly not so, upon the face of it. The petition is founded upon no other consideration, than that Elizabeth Milton was cousin and heir of Dexter, who enfeoffed the Earl of Derby. No merits are mentioned, notwithstanding the statute 4 Hen. IV. c. 4. was then recent. The King himself states, that he was bound to make the grant by *law*, *good faith*, and *conscience*. What the circumstances of the fact were, cannot now be discovered; whether a defeazance, a condition, or an use, or any thing else. Nor is it material to know. It is enough, that the King has recited generally, that he was *bound* to do it. It cannot, therefore, be a *gift*. As to the objection, that the King granted only a particular estate, and kept back the fee, that might be all he was bound to do. Nor can we reason very conclusively from the conduct of such a Prince as Henry IV. He might possibly do only half justice. Such things have happened in later times. Lord Anglesey, after the Restoration, was obliged to restore the estates he had got during the rebellion in Ireland; yet many of the poor owners were glad to compound, and take leases for ninety-nine years, instead of the fee. Upon the whole, as the estate was not of the King's gift, I think it not within the protection of the statute, and therefore the recovery is good." Mr. Justice Yates was of the same opinion; and said, the Court would not stretch to enlarge the interpretation of a statute, which

prohibits the natural right of alienation by tenant in tail.

50. No alteration however in the limitations of an estate tail, whereof the reversion continues in the Crown, will enable the tenant in tail to bar his issue, or the reversion.

51. Thus, in the case of the Earl of Derby, one of the questions was, whether an estate tail, granted by Richard III. to the Derby family as a reward for services, which by a private act of 4 Jac. I. was limited to the heirs male of the family in a different manner from that in which it had been limited by the letters patent, the reversion still continuing in the Crown, was within the protection of these statutes? And the majority of the Judges in the Exchequer Chamber were of opinion, that notwithstanding the alterations made by the private act of parliament, as they were all within the compass of the old entail, and as the reversion still continued in the Crown, the estate was within the protection of the 34 & 35 Hen. VIII.

Murrey v. Eyton and Price, T. Raym. 260. Pollexf. 491. 2 Show. 104. T. Jones, 237. 1 Wils. Rep. 275.

52. It was formerly usual for persons who were seised of estates tail of this kind to procure the concurrence of the Crown to alienate them, which was commonly effected in this manner. The Crown conveyed the reversion to a subject, either in trust for itself, or for the tenant in tail, by which means a fine or recovery was a good bar of the estate tail, according to the second rule laid down by Lord Coke.

58. Thus, it was held by all the Judges, that if the King made a gift in tail, reserving the reversion to himself, and afterwards permitted the tenant in tail to suffer a common recovery, by granting the reversion to a stranger, in trust to reconvey it after the recovery was had, a common recovery suffered under

Chesterfield's Case, Hard. 409. T. Raym. 288. 358. T. Jones, 251.

these circumstances would bar both the estate tail and the reversion; because the reversion was once severed from the Crown, by which means the privity of estate was destroyed: for the intention of the statute was only to restrain common recoveries, where the reversion always continued in the Crown, without any alteration.

Tit. 34. § 10. & 24.

54. Since the statute 1 Ann. st. 1. c. 7. the above mode of evading this act is effectually prevented, the Crown being restrained by that statute from alienating its ancient possessions in fee simple; and therefore an act of parliament is the only mode by which such an entail can now be barred.

Reversions vested in the Crown. Pigot, 85. Neale v. Wilding, 1 Wils. R. 275.

55. Before the statute *De donis*, when the King created a conditional fee, there remained nothing in the Crown but a bare possibility; and if the donee had issue, and afterwards aliened, the King's possibility was barred, as well as that of the subject. After the statute *De donis* had turned that possibility into a reversion, and after common recoveries were allowed to be common assurances, and to bar remainders and reversions, it became a question how far a recovery could bar a remainder or reversion vested in the King: and it was held by the Judges, that though a recovery suffered by a tenant in tail barred the estate tail, yet that it would not affect any interest which the King had in the remainder or reversion, as they did not venture to assert that the Crown could be deprived of any part of its property, under pretence of a recompence in value, which was merely imaginary.

Plowd. 553. 1 Inst. 335 *a*.

Recov. 85.

56. Pigot says it is *vexata questio* how far, at common law, a remainder vested in the King was divested by recovery and discontinuance; but he afterwards admits that neither a fine nor common

recovery can divest any estate in remainder or reversion out of the King. He then says, that if a recovery be on good title against tenant in tail, and the King has the remainder by a defeasible title, there it shall divest the remainder out of the King, and restore and remit the right owners.

57. This opinion appears to be founded on the determinations in Wiseman's case, and Cholmeley's case, where the Court held that the limitation of the reversion to the Crown was void, and therefore that such reversion was barred by the recovery; but admitted that if the reversion had been well vested in the Crown, it could not have been barred. This doctrine has been however denied by some modern lawyers of great eminence. The late Mr. Macnamara, in a very able opinion on a question of this kind, contended that the stat. 34 & 35 Hen. VIII. was merely declaratory of the common law; and that where an estate tail was not protected from the effects of a common recovery, a remainder or reversion in the Crown, expectant on it, was not protected. That the contrary opinion would be introductive of something like a perpetuity; for by a limitation of the ultimate reversion to the Crown, the tenants in tail could only acquire a base fee in the estate. And the late Mr. Serjeant Hill was of the same opinion.

2 Rep. 15 & 50.

58. The usual mode of acquiring a good title to an estate tail, whereof the reversion is in the Crown, is, by obtaining an act of parliament, enacting that the reversion shall be divested out of the Crown, and vested either in the tenant in tail, or in some other private person; by which means it becomes barrable by a common recovery.

Vide Stat. 30 Geo. III. c. 51. Local and Personal Acts, 51 G. III. c. 68.

59. By the statute 21 Hen. VIII. c. 15. § 4. it is enacted, that no manner of statute staple, statute

Estates held by Elegit, &c.

merchant, nor execution by *elegit* shall be avoided, or in any ways made frustrate by means of any feigned recovery.

Executory Devises. Tit. 38. c. 17.

60. A common recovery does not bar an executory devise; of which the reason will be given in a subsequent title.

But if the person entitled to the executory devise is party to a recovery suffered by the person to whom the fee is first devised, and comes in by way of vouchee, it is said that he would be barred.

Ed.

TITLE XXXVI.

RECOVERY.

CHAP. XI.

How Recoveries may be reversed and avoided.

1. *Writ of Error.*
5. *Who may bring it.*
12. *There must be a Writ of* Seire facias.
15. *The Parol demurs for Infancy.*
17. *What may be assigned for Error.*
25. *Must be brought within 20 Years.*
27. *How it may be barred.*
30. *A Recovery may be falsified.*
35. *By a Tenant for Years.*
38. *Courts of Equity.*

SECTION 1.

THE judgment obtained in a common recovery being a matter of record, and similar in almost every respect to a judgment given in an adversary suit, can only be reversed by a writ of error. Writ of Error. Tit. 35. c. 14. § 1.

2. Any alteration may however be made in a recovery, before it is completed. And a recovery may be amended, as to any mistake or misprision of the officers of the court, at any time. The cases on this subject have been already stated. Id. § 2. ante, c. 6.

3. A writ of error to reverse a common recovery must be brought in the Court of King's Bench, unless the error is in the process, in which case it may be reversed in the Court of Common Pleas.

4. By the stat. 34 & 35 Hen. VIII. c. 26. § 113. it is enacted, that all errors and judgments before

any of the justices of the great sessions in Wales, in pleas real or mixt, shall be redressed by writ of error returnable before the justices of the Court of King's Bench in England,

Who may bring it.

5. No person has a right to bring a writ of error for the purpose of reversing a common recovery, unless he has an immediate interest in the lands of which it has been suffered.

Anon. 5 Mod. 396.

6. Thus where a writ of error was brought in the Court of K. B. to reverse a common recovery, and judgment was obtained thereon: but it appearing afterwards that the plaintiff in error had no immediate title to the lands, there being a remainder-man before him, the Court reversed their former judgment of reversal.

7. The right to bring a writ of error descends to the person to whom the land would have descended, in case the recovery had not been suffered.

Henningham v. Windham, 1 Leon. 261.

8. T. Henningham being seised to him, and the heirs male of his body, had issue, Henry his eldest son, and three daughters, and Arthur and two other sons by his second wife. Upon the death of T. Henningham, Henry entered, suffered a common recovery, and died without issue. Arthur the second son brought a writ of error to reverse this recovery, to which it was objected, that he was only of the half blood.

The Court determined that the right to bring a writ of error descended to the person who would have been entitled to the land if no recovery had been suffered; and therefore that Arthur was entitled to the writ of error.

1 Burr. 412.

9. In the case of Sheepshanks v. Lucas, which has been already stated, an objection was made to the writ of error, because the plaintiff did not show how

his title arose. But the Court said, that a complete title need not be set forth in a writ of error: it was only required of the plaintiff in error to show the connection and privity between the person against whom the recovery was had, and the person who brought the writ of error; for it was not like a proceeding to try the right of land, or to recover the land itself.

10. The right of bringing a writ of error to reverse a common recovery does not pass to the Crown on an attainder for high treason.

11. A tenant in tail suffered a common recovery; the remainder-man was attainted of treason, and executed; and by act of parliament forfeited to the King all his manors, &c. reversions, remainders, uses, possessions, offices, rights, conditions, and all other his hereditaments. Winchester's Case, 3 Rep. 1

The recovery being erroneous, the King brought a writ of error to reverse it.

Adjudged, that the writ of error was not given to the King by any words in the act of forfeiture, the party having no right of entry, but only a right of action; which did not pass by those general words. But admitting that the writ of error had passed to the King by the words of the act, yet it would not pass from him to a patentee, by a general grant of the manor, *cum pertinentiis*, and of all the interest, claim, and demand therein; notwithstanding the clause *de speciali gratia*. For if the King could grant it, that grant must be by virtue of his prerogative, as no common person could do it; and then it ought to be by express and precise words.

12. A recovery ought not to be reversed, unless writs of *scire facias* are issued against the terre-tenants and the heir; because errors in a common There must be a Writ of Scire facias,

recovery ought not to be examined, until all the parties interested in supporting it are before the Court.

13. The issuing writs of *scire facias* to the terre-tenants, is not however deemed to be *ex necessitate juris*, but only discretionary in the Court: and therefore a judgment of reversal of a common recovery is not void for the want of a writ of *scire facias*.

Kingston v. Herbert, 2 Show. 490, 3 Mod. 119.

14. Thus, on a motion in the Court of King's Bench to set aside a judgment of reversal of a common recovery on a writ of error brought there, because there was no *scire facias* to the terre-tenants; it was strongly debated, and on all hands agreed to be very inconvenient, that a *scire facias* should not be to the tenants, for otherwise a purchaser might be deprived of his assurance without notice. It was urged that the terre-tenant cannot be party to the writ of error; that they had a record exemplified of the reversal; that the reversal was in 35 Car. II.; that the want of a writ of *scire facias* must be error either in law or in fact; it could not be error in law, for that must appear upon the record itself, which it did not here; it could not be error in fact, because there was no necessity for such a writ, it was only discretionary in the Court, and not *ex necessitate juris*.

The Court was of opinion that the awarding writs of *scire facias* to the terre-tenants was discretionary.

Hall and Ux, v. Woodcock, 1 Burr. 359.

And in a subsequent case Lord Mansfield said, that by the established mode of proceeding, there must be a *scire facias* against the terre-tenants, otherwise it is an irregularity, but no more.

The Parol demurs for Infancy,

15. In a writ of error to reverse a common recovery, the parol shall demur for the infancy of the tenant.

16. In a writ of error from a judgment in the Court of K. B. of Ireland, the case was, that in a writ of error there to reverse a common recovery, the defendant pleaded that he was an infant, and prayed that the parol might demur. To this the plaintiff demurred; and upon argument judgment was given for the defendant, that the parol should demur. The judgment was affirmed. Aland v. Malone, Fitzg. 114.

17. The errors assigned in a common recovery may be either in fact or in law. But by the statute 23 Eliz. c. 3. § 2. it is enacted, that no common recovery shall be reversed or reversable for false or incongruous Latin, razure, interlining, misentering of any warrant of attorney, misreturning or not returning of the sheriff, or other want of form, in words, and not in matter or substance. What may be assigned for Error.

18. Nothing however can be assigned for error in a common recovery which contradicts the record; from which it follows, that no incapacity in a vouchee can be assigned for error, where such vouchee appeared in person: but if a vouchee appears by attorney, an averment may then be made, that such vouchee laboured under some personal disability, which rendered him incapable of suffering a common recovery. Tit. 35. c. 14. § 12.

19. Thus in a writ of error to reverse a common recovery, the error assigned was, that the vouchee was within age, and appeared by attorney. Holland v. Dauntzey, Cro. Eliz. 739. Darey v. Jackson, Palm. 224.

All the Court agreed that this circumstance might well be assigned for error after the death of the vouchee.

20. So in the case of Stokes v. Oliver an averment was allowed, that the vouchee, who appeared by attorney, was an infant; and the recovery was reversed. ante, c. 5. § 10.

21. An averment may of course also be made that a vouchee who appears by attorney is an idiot, or insane. And in the following case it was held by a majority of the Judges in Ireland, that an averment of idiocy might be made against a vouchee who appeared by attorney. And they also held, that neither an inquisition finding that a vouchee was not an idiot, or of unsound memory; nor the caption of a warrant of attorney to suffer a common recovery appearing upon record to have been taken by the Chief Justice of the C. P. out of Court; nor a fine acknowledged before the same Ch. Justice on the same day with the warrant of attorney, for the purpose of making a tenant to the *præcipe*, were conclusive evidence of the sanity and capacity of the vouchee.

Hume v. Burton, Dom. Proc. Hib. 1785.

22. A writ of error was brought in the Court of King's Bench in Ireland, to reverse a common recovery suffered by Nicholas Earl of Ely in 1767, in which he appeared by attorney (having acknowledged a warrant of attorney before the Lord Chief Justice of the Common Pleas for that purpose); and the error assigned was, that the Earl of Ely was of unsound mind. Issue being found upon this fact the plaintiff in error offered to produce evidence of the incapacity of the said Earl; but the counsel for the defendant insisted that the acknowledgment of the warrant of attorney before the Chief Justice was a judicial act and matter of record, and was conclusive evidence of the said Earl's sanity. The Court was of opinion, that the evidence could not be admitted. A bill of exceptions was tendered, and a writ of error brought in the House of Lords of Ireland, where the following question was put to the Judges: "Whether in a case where the vouchee in a common recovery appears by attorney, the caption of

the warrant of attorney, appointing such attorney, appearing upon the record to be taken by the Chief Justice of the Common Pleas out of Court, was conclusive evidence of the capacity of such vouchee, as to the soundness of his mind, to make such attorney and to suffer such recovery?"

The Judges were divided; but the majority were of opinion that the caption of the warrant of attorney, appearing on the record to be taken by the Chief Justice out of court, was not conclusive evidence of the capacity of the vouchee. Whereupon it was ordered and adjudged, that the judgment given in the Court of King's Bench should be reversed; and that the verdict should be set aside and annulled; and that the parties should proceed to a new trial upon the issue joined between them, as in the said record.

A new trial was had, when the plaintiff's counsel offered to give parol evidence, to prove the fact upon which the issue was joined; but the counsel for the defendant insisted, that the plaintiff ought not to be allowed to go into such evidence, as they, on the part of the defendant, had evidence of record to produce, which was conclusive to the fact in issue, and therefore could not be controverted; (that is to say), a commission issued out of the Court of Chancery to try the sanity of the said Nicholas Earl of Ely, and the inquisition taken in consequence of such commission, by which it was found that the said Nicholas Earl of Ely was not an idiot, or a person of unsound mind; and also a fine with proclamations, levied of the lands of which the recovery sought to be impeached had been suffered, and taken before the Chief Justice of the Common Pleas, on the same day on which the warrant was acknowledged;

which fine was levied to Henry Loftus, for the purpose of making him tenant to the *præcipe* in that recovery. The Court being of opinion that this was the proper mode of proceeding, the defendant's counsel accordingly gave in evidence to the jury the said commission and inquisition, finding that Nicholas Earl of Ely was not an idiot, or person of unsound mind, and also a fine with proclamations, levied by the said Nicholas Earl of Ely of the lands, &c. in the said recovery, to Henry Loftus, for the purpose of making him tenant to the *præcipe*, and which was taken by the Lord Ch. Justice of the Court of Common Pleas on the 8th of July 1767, being the same day on which the acknowledgment of the warrant of attorney was taken by the same Chief Justice. And the counsel also gave in evidence the warrant of attorney and the caption thereof. And the defendant's counsel thereupon insisted, that the said inquisition, finding that Nicholas Hume Earl of Ely was not an idiot or person of unsound mind, had for ever concluded that question: that the fine and recovery were both before the court; that the fine was of the same lands, and passed the same estate on the same day to the tenant to the *præcipe* in the recovery, on which the warrant of attorney was acknowledged, and that it constituted part of the same assurance; that the fine gave and was meant to give operation to the recovery, and that without it the recovery would have been a mere nullity; that therefore there was a mass of evidence, conclusive as to the sanity of Nicholas Earl of Ely, and of a nature not to be controverted, laid before the court; and that no parol evidence could or ought to be received on the part of the plaintiff, as to the issue depending.

The Court having declared it to be their opinion, that the said fine, *præcipe*, and concord, together with the caption of the said fine, as likewise the said warrant of attorney, and the caption thereof, were conclusive evidence of the sanity of the said Earl of Ely upon the said issue; a verdict was therefore found for the defendant, and judgment given thereon by the Court of King's Bench, "that the judgment of the Court of Common Pleas should be in all things affirmed, and remain in full force and effect, notwithstanding the causes assigned for error."

A bill of exceptions was taken to the opinion of the Court; and a writ of error was brought in the House of Lords, where the following questions were put to the Judges:

1st. Whether the commission set forth in the said record, and the inquisition thereon, whereby it was found that Nicholas Hume Earl of Ely, in the said commission named, was not, at the time of taking the said inquisition, an idiot, or a person of unsound mind, with the return of the execution of the said commission, which were given in evidence on the part of the defendant in error on the trial of the issue at the bar of the Court of King's Bench in Michaelmas term in the year 1784, joined upon the averment taken by the plaintiff in error in the said cause, was, in point of law, conclusive evidence of the sanity of the said Nicholas Hume Earl of Ely, at the time of taking the warrant of attorney set forth in the present record, and of his capacity at that time, as to the soundness of his mind, to make such warrant of attorney, and suffer such recovery, as in the said record; so as to justify the said Court of King's Bench in refusing, upon the trial of the aforesaid issue, to suffer

the plaintiff in error to go into parol evidence offered by him to prove that the said Nicholas Earl of Ely was of unsound mind at the time of the said warrant taken and acknowledged, and the said recovery suffered?

2d. Whether the commission and the inquisition and return thereon, whereby it was found that Nicholas Hume Earl of Ely was, at the time of taking the said inquisition, not an idiot or a person of unsound mind, together with the fine, *præcipe*, concord, and caption of the said fine, as likewise the warrant of attorney and the caption thereof, on the 8th day of July 1767, as set forth in the said record, and what part of the said evidence, were, in point of law, conclusive evidence upon the issue which came on to be tried at the bar of the Court of King's Bench, of the sanity of the said Nicholas Hume Earl of Ely, and of his capacity as to the soundness of his mind, to make such warrant of attorney, and suffer such recovery, as in the present record; issue having been joined upon the averment taken by the plaintiff in error on the said case, after the death of the said Nicholas, and the said warrant of attorney and caption thereof set forth in the record, appearing to have been made and acknowledged before the said Chief Justice of the Court of Common Pleas, at the same time that the caption of the said fine was taken and acknowledged by and before him; and it appearing to the said Court upon the said record, that the tenant to the *præcipe* in the said recovery was made by fine, levied and acknowledged by the said Nicholas; so as to warrant the said Court of King's Bench in refusing, upon the trial of the aforesaid issue, to permit the plaintiff in error to go into parol evidence, offered by

him to prove that the said Nicholas was of unsound mind at the time of the said fine taken, and warrant of attorney acknowledged, and recovery suffered?

3d. Whether, in case where a fine with proclamations is levied by tenant in tail, and the *præcipe* is brought in the same term against the conusee of such fine, and a common recovery suffered thereupon, such fine, *præcipe*, and common recovery, are to be considered in law as one common assurance or conveyance, or as separate common assurances or conveyances.

As to the first question, the Judges were unanimously of opinion, that the commission and inquisition were not conclusive evidence of the sanity of Nicholas Earl of Ely. As to the second question, four of the Judges were of opinion, that the acknowledgement of the fine was not conclusive evidence of the sanity of Nicholas Earl of Ely, and three of the Judges were of a contrary opinion. And as to the third question, the Judges were unanimously of opinion, that the fine and recovery were to be considered as one assurance.

The judgment of the Court of King's Bench was affirmed.

The author has been favoured with the following accurate note of Lord Chief Baron Yelverton's argument in this case. And as his Lordship's opinion coincided with that of the majority of the Judges, and also of the Lord Chancellor, it is presumed that it must prove extremely acceptable to the profession.

Lord Ch. B. Yelverton.—The Court of King's Bench has determined, and the Judges have all agreed, that the inquisition finding Nicholas Earl of Ely not to have been an idiot, or of unsound mind, is not con-

clusive evidence of his sanity at the time of acknowledging the warrant of attorney mentioned in the question: your Lordships have determined that the warrant of attorney is not in itself conclusive evidence of the sanity of Lord Ely, at the time of acknowledging such warrant; but that it is a matter in *pais*, and triable by a jury: the only remaining question, therefore, is, whether the fine be conclusive evidence of his sanity at the time of acknowledging the warrant. The fine, I do admit, is *quasi* a judgment, and, in that light, I will beg leave leave to consider it; but it is not therefore conclusive evidence of the sanity of the conusor to do another act. In what cases judgments shall conclude either as pleas or as evidence, is no where better defined than in that learned argument of Lord Chief Justice De Grey, in the Duchess of Kingston's case: "First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive, upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment."

State Trials, vol. 11. p. 261.

These rules are laid down with so much precision and accuracy, that there is not a word contained in them which has not its sterling value; nor has a case been cited, nor do I believe a case can be put, which

does not fall within them; for either they are cases where acts of parliament have established exclusive jurisdiction between certain parties, as the certificates of commissioners for settling army accounts, or the proof of debts before commissioners of bankrupts under the control of the great seal; or sentences in matrimonial causes annulling a marriage, where one of the parties, in a civil suit, claimed a title, or founded a defence upon such marriage; or sentences of exclusive jurisdiction, acting directly in *rem*, and to which all the world are supposed to be parties, as condemnations in the Court of Exchequer, which are had by public proclamations, inviting all persons whatsoever to come in and claim their property; or the sentences of Admiralty Courts, which judge between nation and nation, and from whose decision there lies no appeal but to the sword. But, in all these cases, the parties to the suits, or the parties against whom the evidence was received, were parties to the sentences, and had acquiesced under them, or derived under those who had; or they were sentences in suits to which all persons were or might have been parties.

Now, if a fine were like an ordinary judgment of a court of competent jurisdiction, it would not be conclusive evidence in the present instance, and for these reasons; because there is no act of parliament which has made a fine under these circumstances conclusive against a remainder-man; the remainder-man does not claim under the fine, he never could be said to acquiesce under it, because he could not impeach it, he is no party to it, nor does he claim under any man who is. And though I must acknowledge that fines do in some respects stand on a ground peculiar to themselves, a ground whereon the wisdom of our

ancestors hath placed them, for the assurance of titles, and quieting of possessions; yet I must say, that that memorable act, which gives to fines their present force and efficacy, which directs their operation, and where they operate has made them irresistible, does not in any of its provisions materially depart from those rules, under which other judgments have been held to be conclusive: for the effect of that act is two-fold. Under that act a fine with proclamations, by tenant in tail, whether the proclamations are finished in his lifetime or not, will bar the issue in tail. But why? because the fine is *quasi* a judgment, and the issue in tail claims the estate through his ancestor, whose right was barred by the judgment.—Again, by that statute, a fine with proclamations, if five years after the title accrued are suffered to pass without claim, will bar every man who does not come within the savings of that act. But why? because there the fine acts *quasi in rem*; for, by the proclamations, all men are invited to claim, if any right they have; and having failed to do so within the time prescribed by law, they are therefore barred. But the case of the plaintiff in error does not fall within either of these conclusions; for he is not the issue in tail of the conusor of the fine, nor is the fine produced against him, as a judgment to bar his right. If the defendant in error intended to make that use of it, he ought to have pleaded it to the writ of error, and have given the plaintiff an opportunity of replying that he claimed within the five years, or that he came within the savings of the act. The fine is therefore offered, not as a bar to the right of the plaintiff in error, by its own force, but as conclusive evidence of the sanity of a conusor to do another act, which is a bar to his right. And so, though it does not bar the

right, it takes away the remedy; and though it would not conclude, if pleaded as a judgment, yet, when offered as a piece of evidence, it shall have the magic virtue of sealing up the lips of the court and the jury, the parties and the witnesses.—But I know of only one case, where it has been held that a fine is conclusive to the capacity of the conusor to do another act, and this is the case of a fine and a deed leading the uses of that fine. In that case, it has certainly been held for law, that a man whose right is by law barrable by a fine, shall not be received to aver against the capacity of the conusor to execute the deed; beeause it is said, the fine is the principal, and the deed the accessary; and a man who is enabled to do the principal, shall not be held disabled to do the accessary. But that rule of law was adopted through necessity, because all fines operate to uses, and uses are governed by the intent. Whereas, if the deed were avoided, the fine would no longer operate to the uses to which it was intended to enure, and so the fine would in effect be avoided, because the uses of it could not take place. But to apply that rule to the case of a fine and recovery, it would be necessary to establish two positions, neither of which is true. First, that the fine is the principal, and the recovery the accessary; and, secondly, that if you avoid the recovery, you also avoid the fine. But there is not a single saying in the books, that the fine is the principal, and the recovery the accessary; for the only use of making the tenant to the *præcipe* by fine, is, to put the evidence of there being a good tenant to the *præcipe* on record; and though you should avoid the recovery, the fine will nevertheless stand; for the writ of error does not impeach, nor will the judgment reach it. And *vice versa*, though the fine should be

hereafter avoided, yet the recovery could not be thereby avoided, if it were otherwise good. And with respect to a recovery, and a deed leading the uses of a recovery, the law is the very reverse of what it is in the case of a fine, and a deed leading the use of a fine. In the case of a recovery and deed, the deed has in more instances than one been held to be the principal, and the recovery the accessary; and accordingly a party, whose right would be otherwise barred by the recovery, has been allowed to impeach the sanity of the vouchee, at the time of the execution of the deed, and so avoid the operation of the recovery. But it seems to be conceived that there is a something or other in this case, which distinguishes it out of the ordinary rules of law. I will therefore beg leave to examine what that something is, by applying myself immediately to the interrogatories contained in the question. And, first, the question imports a doubt, whether two or more acts do, in point of law, make one and the same assurance: the capacity of the agent to do one act does not conclude to his capacity to do the other; and consequently, whether the capacity of Lord Ely to levy the fine, does not conclude his capacity to acknowledge the warrant of attorney: but my answer is, that there is only one instance in which the capacity of an agent to do one act, concludes to his capacity to do another, where the two make one assurance; and that is the case of a fine and deed leading the uses; but in every other case but that, I answer in the negative; and I prove the truth of my answer thus:—If a man had levied a fine twenty years ago, with intent to make a tenant to the *præcipe* in a recovery then intended to be suffered, and the recovery is not suffered for twenty years after, the fine and recovery are, in point of law, one and the same assurance, as much as if they were

both of the same term; and yet no man in his senses will say that a fine levied twenty years ago, is conclusive evidence of the sanity of the conusor twenty years after. But then the question asks, where two acts are done at one and the same time, and one of those acts is in itself conclusive evidence of the capacity of the agent to do that act, shall it not be conclusive evidence of his capacity to do the other. But my answer to that question is also in the negative; because if it were otherwise, then the act which is in itself conclusive evidence of the agent's capacity to do that act, would be conclusive evidence of his capacity to do any other act whatsoever, whether it made a part of the same assurance or not. And so if an idiot levied a fine, (and the history of the law proves, that idiots have been received to levy fines,) and at the same time made his will, that fine would be conclusive evidence of his capacity to make such a will, which no man in his senses will maintain. But the question inquires farther, whether, where two acts, the one of which is conclusive in itself, and the other not, make but one assurance, and are done at one and the same time, these two circumstances put together, do not make one act conclusive evidence of the capacity of the agent to do the other. But I answer, not; because I believe no two acts can be supposed more intimately connected with each other, both in unity of time and of assurance, than a will of a real and a personal estate, written upon one and the same piece of paper or parchment, and subscribed by one and the same signature; and yet it is clear law, that though the probate of such a will is conclusive evidence of the sanity of the testator to make such will, yet it is by no means conclusive evidence of his capacity to dispose of his real estate. And why?

evidently because the capacity of the party to do the two acts is triable by different jurisdictions. And the same reason applies to the case of the fine and the warrant of attorney: for as the capacity of the testator in the first case is triable by the Judge of the Spiritual Court, as to the personal estate, and his capacity as to his real estate by a jury; so in the latter case the capacity of the conusor to levy the fine is triable by the fine itself, and his capacity to acknowledge the warrant is triable by a jury. From all which I am warranted to lay it down as a general position, that the capacity of a party to do one act, is not conclusive to his capacity to do another, if his capacity as to that other be triable by a different jurisdiction, whether the two acts make one and the same assurance, or are done at one and the same time, or not.

It will then perhaps be asked, What! and has the fine no operation? is it not even evidence? I answer that it has all the operation it was ever intended to have; it has made a good tenant to the *præcipe*, and has put the evidence of it on record: and if the plaintiff in error had assigned for error, that there was not a good tenant to the *præcipe*, he would have been concluded by the fine: and further, if the fine had been pleaded to the writ of error, as a fine with proclamations, upon which five years after the title accrued had run, without any claim, and that the plaintiff in error could not reply that he had claimed within the five years, or that he came within the savings of the statute, he would in like manner have been barred by the fine. But as the case is at present circumstanced, the fine proves nothing conclusively but its own existence. I say it proves nothing conclusively but that: but, when I say so, I would not

be understood to mean, that it is not evidence to go to a jury; for, on the contrary, I think it is evidence, and evidence of the most persuasive nature, but especially when coupled with the inquisition and warrant of attorney: for though I cannot subscribe to the doctrine which the question seems to insinuate, that a legal conclusion admits of degrees of comparative strength, or that it is more or less conclusive at different times; and though I can no more admit that three pieces of evidence, none of which is conclusive in itself, do altogether amount to a conclusion, any more than I can, that three cyphers make a unit; yet I feel very sensibly that persuasive evidence may be more or less strong according to its nature, and that three pieces of evidence, tending to establish one and the same fact, are stronger evidence than one of them would be singly. And therefore, upon the whole, my answer to the second question is, that the inquisition, the fine, and the warrant of attorney, are not in any case which has been put singly, or altogether, conclusive evidence, so as to warrant the judgment of the Court of King's Bench.

23. An averment may also be made that the vouchee died before the judgment was given, where such vouchee appeared by attorney.

24. Thus, in the case of Wynne v. Wynne, one of the questions was, whether the plaintiff in error was not estopped to assign the death of the vouchee to have happened on the 10th of May, which was before the judgment was given; when it appeared upon the face of the record that she appeared by attorney on the return-day of the writ or summons, which was the 16th of May. ante, c. 3. § 38. 1 Wils. R. 42.

The Court was clearly of opinion, that the death of the vouchee before judgment was not contrary,

but a matter collateral to the record, and properly assignable for error, and triable by a jury: for all the record said was, that the vouchee appeared by her attorney; it did not say any thing of her actual existence at the time, but put a matter in issue, which was properly triable by the country.

Must be brought within Twenty Years. Tit. 35. c. 14. § 22.

25. The statute 10 & 11 Wm. III. c. 4. has been stated in the former Title, by which it is enacted, that a writ of error to reverse a common recovery must be brought within twenty years after such recovery has been suffered, and not within twenty years after the accruer of the title to the lands.

Lloyd v. Vaughan, 2 Stra. 1257.

26. A writ of error was brought 19 Geo. II. to reverse a common recovery which was suffered in 5 Ann. The defendant pleaded this statute in bar, the writ of error not having been brought within twenty years after the recovery was suffered: to which it was answered, that the plaintiff's title did not accrue until the death of one of the vouchees without issue in the year 1739. After several arguments, the Court determined that the writ of error did not lie; because the statute 10 & 11 Wm. III. was made to quiet possessions, and to fix a certain period beyond which fines and recoveries should not be impeached; for the words of the statute are express, "twenty years after such fine levied or recovery suffered." And it has not the words which are in the statute of fines, *viz.* after the title accrued. The *terminus a quo* is the time when the recovery is suffered; and if that was once exceeded, there would be no knowing where to stop. A reversioner, after an estate tail which had subsisted above a century, might upon this principle be allowed to reverse a common recovery; whereas persons in reversion were never the objects of the Legislature's care. It was sufficient that they

had a chance of the reversion's vesting within the twenty years, in which case they might bring a writ of error, but not afterwards.

27. A person may bar himself from bringing a writ of error to reverse a common recovery, by the same means by which he may bar himself from bringing a writ of error to reverse a fine. Thus Pigot says, "If he who suffers a common recovery levy a fine, or make a feoffment, he cannot have a writ of error to reverse it." How it may be barred. Tit. 35. c. 14. § 24. pa. 169.

28. A release of errors from the common vouchee cannot be pleaded in bar of a writ of error to reverse a common recovery.

29. In a writ of error to reverse a common recovery, the defendant pleaded a release of all errors by the last and common vouchee. Norrice v. Winchester, Cro. Eliz. 2.

It was resolved by all the Judges that such a release could not be pleaded; for the common vouchee was put in only for form, and in truth he rendered nothing; therefore it was against reason that his release should bar others that suffered the loss, and were entitled to have a remedy by the reversal of the judgment.

30. As a common recovery can only be reversed by a writ of error, or some proceeding of a similar nature, to which none are entitled but those who have an immediate interest in the lands, the law allows all strangers, whose interests are affected by a common recovery, to falsify it. And it is laid down by Booth, in his Law of Real Actions, chap. 24, that a common recovery may be falsified, 1°, by entry and plea; 2°, by action; 3°, by action and plea; and 4°, by plea only. A Recovery may be falsified. Pigot, 156.

31. A common recovery may be falsified and invalidated on a trial in ejectment; for if a common reco-

very is given in evidence, and set up by way of defence, the plaintiff may show any defect in the recovery; and if the Court is of opinion that the recovery is void, and the plaintiff entitled to recover, such recovery is completely falsified, as to that action.

32. Thus, it may be shown that the person against whom the writ was brought had no estate of freehold in the land at the time; and the cases of Dormer v. Parkhurst, Goodtitle v. Chandos, and Taylor v. Horde, which have been already stated, are instances of recoveries falsified in ejectment, for want of a good tenant to the *præcipe*.

1 Vesey, 403. 3 Atk. 313.

33. In the case of Sir Butler Wentworth, which was tried at the bar of the Court of Common Pleas in Mich. 1744, evidence of weakness of understanding was admitted to invalidate the deed, by which a tenant to the *præcipe* was made, for the purpose of suffering a common recovery; and the effect of the recovery was by that means defeated.

ante, § 22.

34. In the case of Hume v. Burton, Lord Chancellor Lifford cited the case of Jones ex dem. Hale v. Cave, tried at Hereford at the Lent assises in 1765, by Sir Eardley Wilmot, in which evidence was admitted to prove the weakness of understanding of a vouchee in a common recovery, who appeared by attorney, and the recovery was by that means invalidated.

A motion was made the next term for a new trial, on account of misdirection of the Judge, and it was contended that such evidence ought not to have been admitted; but the motion was refused.

By a Tenant for Years. 1 Inst. 46 *a*.

35. At common law, if the tenant of the freehold had suffered a common recovery, it operated as a good bar to all terms for years derived out of the freehold;

for the person who recovered the lands was supposed to come in by a title paramount, so that he was not bound by the leases of the person against whom he recovered: besides, a termor for years could not in any case falsify a common recovery. Plowd. 83.

36. By the statute of Gloucester, 1 Edw. I. c. 11. a remedy was given to the lessee for years, by way of receit and trial, whether the recovery was upon good title, or by way of collusion; and in case it appeared that the recovery was by collusion, then the lessee for years was permitted to enjoy his term, and the execution was staid until the determination of the term.

37. The operation of this statute not having been found sufficiently extensive, another act was made, 21 Hen. VIII. c. 15, whereby it is provided, that a tenant for years may falsify a feigned recovery had against the person in reversion. Bro. Ab. tit. Lease, 26. Fitz. N. B. 198. 220. Vaugh. 127.

38. Although a common recovery can only be reversed by the Court of C. P. in the first instance, and by the Court of K. B. upon a writ of error from the Court of C. P., yet the Court of Chancery can, in fact, invalidate a common recovery, where it appears to have been obtained by fraud or imposition, by compelling the recoveror to convey the estate to the person who is entitled in equity to have it, or by declaring the recoveror to be a trustee for such person. Courts of Equity. Tit. 35. c. 14. § 69.

39. Where a person who was deaf and dumb suffered a common recovery of entailed lands, assisted by his uncle, and then settled the same to certain uses; upon the circumstances of the case it appeared he had done nothing but what in conscience he ought to have done, yet being under these circumstances, Ferres v. Ferres, 2 Ab. Eq. 695.

the Lord Chancellor said he ought to be taken care of in equity; and it appearing that the uncle was concerned in point of interest, the settlement was set aside. But had he been assisted by an able and faithful relation, that was not interested, equity would not have relieved him in so reasonable an act as this appeared to be.

40. A court of equity will also restrain the operation of a common recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect.

Stanhope v. Thacker, Prec. in Cha. 435.

41. Where a father, on his son's marriage, by lease and release conveyed lands to trustees and their heirs, to the use of the father for life, remainder to his wife for life, remainder to the son for ninety-nine years, if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the son's intended wife for life for her jointure, remainder to the first and every other son of that marriage in tail male, remainder to the daughter or daughters of that marriage and the heirs of their bodies, till they should, out of the rents, issues, and profits have received 3000*l.*, remainder to the heirs of the body of the son, remainder to the second son of the father, and to his first and other sons, remainder to the right heirs of the son for ever. The marriage took effect, and they had only two daughters, who being in possession after all the other estates determined which were precedent, suffered a recovery to the use of themselves and their heirs; and one question in this case was, whether by this recovery the remainders were not barred. And it was argued that they were, because the primary intention of this limitation was to make them tenants in tail, and the

raising of the 3000*l.* was but a secondary intention thereof; and when they, being so tenants in tail, suffered a recovery, this barred their estate tail, and the remainders depending thereon. But the Lord Chancellor was clear of opinion, both upon the first speaking to it, and the next day after, that this was but in the nature of a security for the 3000*l.*; and though the recovery barred the estate tail and remainders at law, yet the daughters were but in the nature of trustees (after the 3000*l.* raised) for those in remainder; that before the recovery they had but an estate tail for their security for that sum; that after the recovery they had the fee-simple; but still the same in a court of equity was but a security till that money was raised; that those in the remainder had the equity of redemption in the same manner as the person who made that security would have had if no such limitation in remainder had been; therefore they might at any time, by paying off that 3000*l.* determine the estate of the daughters, and then the daughters would be but trustees for them.

42. Where a person is prevented from suffering a common recovery by force and management, the Court of Chancery will compel the parties to act as if the recovery had been suffered.

43. Thus, where Lord Waltham being tenant in tail, and meaning to suffer a common recovery, and by will to give real interests to his wife, Mr. Luttrell, who by his marriage had an interest to prevent the entail being barred, did, by force and management, prevent the testator from executing the deed to make the tenant to the *præcipe*. Luttrell v. Olmius, 11 Ves. 638.

Lord Thurlow's opinion was clear, that though at law Mr. Luttrell's lady was tenant in tail, and which made it stronger, she was no party to the transaction,

yet neither he nor any one else could have the benefit of the fraud; and the jury, upon an issue directed, having found that the recovery was fraudulently prevented, Lord Thurlow held, even in favour of a volunteer, that the tenant in tail should not take advantage of the iniquitous act, though she was not a party to it; and the estate was considered exactly as if the recovery had been suffered.

TITLE XXXVII.

ALIENATION BY CUSTOM.

CHAP. I.

Alienation of Copyholds by Surrender and Admittance.

CHAP. II.

How Entails of Copyholds may be barred, and Effect of Releases.

CHAP. I.

Alienation of Copyholds by Surrender and Admittance.

1. *Alienation by Custom.*
5. *Surrender.*
16. *Who may surrender.*
23. *What Estate may be surrendered.*
28. *To whose Use a Surrender may be made.*
36. *Presentment.*
40. *Admittance.*
49. *Who may admit.*
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52. *Effect of a Surrender and Admittance.*
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60. *Surrenders by Way of Mortgage.*
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76. *Construction of Surrenders.*
99. *A Surrender is sometimes supplied in Equity.*
105. *Agreement to surrender.*

Section 1.

Alienation by Custom. Tit. 10. c. 3. § 18.

IT has been already shown, that copyholders being mere tenants at will, cannot alien their estates by feoffment or other assurance at common law; but by the custom of all manors in which this

kind of property is to be found, every copyholder has a power of transferring his estate to any other person, by surrendering or yielding it up to the lord of the manor, in trust that he may grant it out again to the person named in the surrender, which is therefore called an alienation by custom.

2. This practice is as ancient as the time of Bracton, who says—*Si autem villanus sockmannus villanum socagium ad alium transferre voluerit, prius illud restituat domino, vel servienti, si dominus præsens non fuerit, et de manibus ipsorum fiat translatio ad alium, tenendum liberè, vel in socagio, secundum quod domino placuerit; quia ille villanus sockmannus non habet potestatem tranferendi, cum liberum tenementum non habeat, sed dominus.*

Lib. 2. c. 8. fo. 26 *b.*

3. In the case of free copyholds or customary freeholds, the mode of alienation has always been the same as in common copyholds. Thus, Bracton says—*Dare enim non possunt tenementa sua, nec ex causa donationis ad alio stransferre, non magis quam villani puri; et unde si transferre debeant, restituant ea domino vel ballivo, et ipsi ea tradunt aliis, in villenagium tenenda.*

209 *a.*

4. The process in most manors is, that the tenant surrenders his estate to the lord, in trust to be again granted by him to such persons and for such uses as are mentioned in the surrender. This surrender must be presented by the jury or homage of the manor, and found by them upon their oaths, and then the lord grants the land to the person named in the surrender, to hold by the ancient rent and customary services, and thereupon admits him tenant to the copyhold by the delivery of a rod, a glove, or the like, in the name of corporal seisin of the lands and tenements.

This mode of alienation therefore consists of three parts—the surrender, the presentment, and the admittance.

Surrender.

5. A surrender is a yielding up of the estate by the tenant to the lord, for the purpose of being regranted to some other person. The form of it is thus:—*Ad hanc curiam venit A. et sursum reddidit in eadem curia unum messuagium, &c. in manus domini ad usum B. et hæredum suorum.*

Cop. § 39.

6. Lord Coke says, the word surrender is *vocabulum artis;* and therefore, where a surrender is necessary, if this word be wanting, all other words used in ordinary conveyances are insufficient to transfer a copyhold estate; for as a copyholder is tied to a particular mode of conveyance, so he is restrained to a particular form of words.

Idem.

7. Lord Coke also says, that a surrender is rather a manifesting of the grantor's intention, than of passing away any interest in the possession; for till admittance the lord takes notice of the grantor as tenant, and he shall receive the profits of the lands to his own use, and shall discharge all services due to the lord: hence it is held, that till admittance, the surrenderor is a trustee for the person to whom the surrender is made.

Davie v. Beversham, 2 Cha. R. 3. 2 Freem. 157. 1 Term R. 601.

1 Inst. 59 *a.*

8. Every copyholder may surrender his estate in court without alleging any particular custom for it: so a copyholder may surrender to the lord himself out of court, without a special custom.

4 Rep. 30 *b.*

9. A surrender out of court to the steward of the manor is also good, by the general custom of all manors, though the steward be only appointed by parol; and Lord Coke says, by the surrender out of court, the copyhold estate passes to the lord under a secret condition, that it be presented at the next

1 Inst. 62 *a.*

court, according to the custom of the manor; and therefore if, after such a surrender, and before the next court, he who made the surrender dies, yet the surrender will be good.

Id. 59 *a.*

10. A surrender out of court, by the hands of two or three tenants of the manor, or by the hands of the bailiff or reeve, or of any other person, must be warranted by a special custom, and particularly pleaded.

Parker v. Kett, 1 Ld. Raym. 658.

11. A surrender of a copyhold to a deputy of a deputy steward, out of court, is good, because he is a steward *de facto* at the time.

Co.Cop. § 34. Combe's Case, 9 Rep. 75.

12. A copyholder may surrender in court by attorney, without a special custom to warrant it; for he may surrender by the general custom, which is the common law, and then it is incident to do it by attorney. A copyholder cannot however surrender into the hands of two tenants by attorney; for such surrender, though in person, is not warranted without a special custom.

9 Rep. 76 *a.*

Id. *b.*

13. An attorney who makes a surrender ought to pursue the usual form, as by the rod, &c., according to the custom of the manor; and he ought to make it in the name of his principal, not in his own name, or show his authority, and say he surrenders it by force of such authority.

14. A purchaser of a copyhold is however not obliged to accept of a surrender by a letter of attorney.

Mitchell v. Neale, 2 Ves. 679.

15. Upon a bill for a specific performance of an agreement for sale of copyhold lands, the defendant insisted upon making the surrender by attorney, and not otherwise, and that he was ready to do so. The plaintiff insisted on his doing it in person, and entered into proof that the custom of the manor was, that

whoever wanted to surrender must, unless in special cases of disability, do it in person. By a decree at the Rolls, a trial was directed as to this custom; and on an appeal to Lord Hardwicke, the decree was affirmed, because no court of justice would compel a purchaser to accept of a doubtful title.

16. All persons who are capable of conveying their estates by any common law assurance, are also enabled to surrender their copyhold estates. Who may Surrender. Co. Cop. § 34.

17. By the statute 48 Geo. III. c. 75. it is enacted, that it shall be lawful for the Lord Chancellor to order the committees of lunatics to surrender the copyhold estates of such lunatics for payment of their debts, or performance of their contracts.

18. By the general custom, a husband and wife may surrender the wife's copyhold, provided the wife is privately examined by the steward; and where there is a special custom to warrant it, a surrender by the husband and wife, made out of court, upon an examination of the wife, before two tenants of the manor, is good. Gilb. Ten. 277. 312. Erish v. Rives, Cro. Eliz. 717.

19. But a custom for a married woman to surrender her copyhold lands without the assent of her husband, is void; because it is contrary to the general law and policy of the nation, and would tend to render wives independent of their husbands.

20. Frances, the wife of William Geary, being entitled to a copyhold estate, which had descended to her from her father, was admitted; and being privately examined, surrendered the estate to the use of herself for life, with remainder over. Stephens v. Tyrrell, 2 Wils. R. 1.

It was stated, that there was a custom in the manor, that a feme covert, seised in fee of copyhold lands, might dispose of her estate without her husband's joining.

After several arguments, the whole Court were clearly of opinion that this was a bad custom.

Compton v. Collinson, 1 H. Black 334.

21. But where a married woman lived apart from her husband, under articles of separation, by which he covenanted that she should enjoy to her own use all such estates, both real and personal, as should come to her during her coverture, and that he would join in the necessary conveyances to limit them to such uses as she should appoint. Afterwards, copyholds having descended to the wife, the husband again covenanted in the same manner as before, that he would join in surrendering such estates to such uses as his wife should appoint. It was held by the Court of Common Pleas, that a surrender by the wife alone was good, although there was no special custom to authorize it.

Tit. 36 c. 10. § 7 Harrington v. Smith, 2 Sid. 41. 73. 4 Mod. 45.

22. Copyhold estates are not within the words or intention of the st. 11 Hen. VII. c. 20: for they cannot be discontinued or conveyed in any other manner than by surrender. Nor does the stat. 32 Hen. VIII. c. 28. extend to copyholds, for the words of it only allude to estates which pass by common law conveyances; and if it were construed to comprehend copyholds, the heir of the wife would become tenant, without being admitted by the lord.

Moo. 596.

What Estate may be surrendered.

23. Nothing can be surrendered but a legal estate. It is not however necessary that such legal estate should be in possession; it is sufficient if it be vested in interest; and therefore an estate in remainder, or reversion, may be surrendered.

Co. Cop. § 39. Doe v. Tofield, 11 East, 246.

24. A person cannot surrender a copyhold till he is himself admitted. And Lord Coke says, if he surrender to the use of another, the surrender is merely void, and by no matter *ex post facto* can be confirmed.

It has however been already stated, that where a person gives a power by will to trustees to sell his copyholds, they may sell without being admitted; and the lord will be bound to admit the purchaser. Holder v. Preston, Tit. 10. c. 4. § 25.

25. A mere possibility cannot be surrendered; and therefore it was resolved in a late case, that a surrender by the heir apparent of a copyholder, in the lifetime of his ancestor, had no effect whatever, and did not even operate as an estoppel, though the heir survived his ancestor. Goodtitle v. Moyse, 3 Term R. 365.

26. It follows, that an equitable interest in a copyhold may be transferred from one person to another without a surrender, for otherwise it would be unalienable. Tit. 38. c. 4.

27. The construction of a surrender, as to the description of the premises surrendered, is the same as that of deeds. Roe v. Conolly, 5 East R.

28. A copyhold estate may be surrendered to the use of any person capable of taking an estate by a common law conveyance; and also to some persons not capable of taking by such assurances. To whose Use a Surrender may be made.

29. In grants at common law, if the grantee be not in *rerum natura*, and capable of taking at the time when the grant is made, it is merely void; but in the case of surrenders the law is otherwise: for though at the time of the surrender the grantee be not *in esse*, or not capable of a surrender, yet if he be *in esse* and capable at the time of the admittance, that will be sufficient; and therefore a surrender to the use of him who shall be heir to I. S., or to the use of I. S.'s next child, or to the use of I. S.'s wife, though at the time of the surrender I. S. had no heir, child, or wife, yet if afterwards he hath a child, or taketh a wife, his heir, his child, or his wife, may come into Co. Cop. § 35.

court, and compel the lord to admit, according to the surrender.

Idem. Lord Coke says, the reason of the law is this, because a surrender is a thing executory, which is executed by the subsequent admittance, and nothing is vested in the grantee before the lord has admitted him, according to the surrender; therefore, if at the time of the admittance the grantee be in *rerum natura*, and able to take, that will serve.

263. 30. Lord Ch. B. Gilbert in his Treatise of Tenures observes, that this doctrine seems to be reasonable, and to carry no inconvenience with it; for it is not like a grant at common law; for there, if there be nobody to take, the grant is void, because the estate must be somewhere, and the grant puts it out of the grantor. But in the case of a surrender, there is no inconvenience at all; for the surrenderee has nothing till admittance, the estate being in the surrenderor. But then it seems, that if the surrenderee be not *in esse* before the admittance, the surrender will be void: this seems to be implied by Lord Coke; for he says, that if at the time of the admittance the grantee be in *rerum natura*, that will serve; which implies that the admittance is to be made after the usual manner; not that the admittance shall be put off till there be such a person: for if the person to whom the surrender was made should ever come *in esse*, then the admittance time would be eternally put off, the old surrender would stand good, and nobody be able to dispose of the copyhold estate.

Gilb. Ten. 264. 31. A surrender to an infant in *ventre matris* is good, upon the same principle.

Bunting v. Lepingwell, 4 Rep. 29 *a*. 32. It was resolved in 27 & 28 Eliz., that a man may surrender a copyhold to the use of his wife, be-

cause the husband does not make it immediately to his wife, but by two means, *scil.* by surrender of the husband to the lord to the use of the wife, and by admittance of the lord to the wife, according to the surrender. Co. Cop. § 35.

33. A wife may also, where the custom authorizes it, surrender her copyhold estate to the use of her husband. Idem.

34. Lord Coke says, it is not necessary that, upon surrenders of copyholds, the name of the party to whose use the surrender is made be precisely set down, if by any manner of circumstance the grantee may be certainly known. And therefore a surrender made to the Lord Archbishop of Canterbury, or to the Lord Mayor of London, or the Sheriff of Norfolk, without mentioning either their christian name or sirname, is good enough. So the surrender to the use of the next of blood of the wife, or brother, or sister of the surrenderor, he having but one brother or sister, will be good. Idem.

35. A person may also surrender his copyhold to the use of his will. Vide Tit. 38. ch. 4.

36. By the general custom of copyholds, all surrenders made in court must be presented by the homage or jury: and where surrenders are made out of court, they must be presented at the next court which is held after such surrender is made: but in some manors more time is allowed for presenting surrenders. Presentment. 2 Ves. 302.

37. It seems, that presentment of a surrender in court is only by way of instruction, to give the lord notice of the surrender. But a presentment is not of absolute necessity; for if the lord does not require a presentment to be made, and proceeds without it, Gilb. Ten. 278.

any subsequent act of his which shows his assent to the surrender, will be sufficient.

1 Inst. 62 *a.* 4 Rep. 29 *b.*

38. A surrender is good though the surrenderor dies before it is presented, provided it be presented within the time required by the custom. And so it is if the persons to whom the surrender is made die before presentment.

Frosel v. Welsh, Cro. Ja. 403.

39. Copyhold lands were surrendered to two tenants out of court, who died before presentment. It was held, that the surrender was good, and might be presented at the next court, by any other copyholder of the manor.

Admittance.

40. When a surrender is duly presented in court, by the homage or jury, the lord, by his steward, grants the copyhold which has been surrendered and presented, to the person to whose use it was surrendered, and thereupon admits him tenant to the copyhold; and the grant and admittance is entered on the court-rolls of the manor, in the following words:

Tit. 10. c. 2. § 5.

41. "And the said C. D. being present in court in his own proper person, prayed to be admitted tenant to all and singular the said last-mentioned premises, according to the form and effect of the said surrender: to whom the lord of the said manor, by his said steward, granted seisin thereof by the rod, to hold to him the said C. D. and his heirs for ever, at the will of the lord, according to the custom of the said manor, by the rents, duties, and services therefore due and of right accustomed. And he was admitted tenant thereof in form aforesaid; gave to the lord for a fine five shillings, and made his fealty."

c. 2. § 3.

42. It has been stated in Title X. *Copyhold*, that every copyhold estate is held by a grant from the lord. But in the case of a sale or descent of a copy-

hold, no separate grant is made to the purchaser or heir, the grant being inserted in the admittance. From which it has been held, that the admittance may be pleaded by way of grant. 4 Rep. 22 *b.* Cro. Ja. 103.

43. Lord Coke says, in admittances upon surrenders, the lord to no intent is reputed as owner but wholly as an instrument; and the party admitted shall be subject to no charges or incumbrances of the lord; for he claims his estate under the party that made the surrender; and in a plaint in the nature of a writ of entry in the *per*, it shall be supposed in the *per* by him, not by the lord. Co. Cop. § 41.

44. The acceptance of the new tenant by the lord, constitutes the essence of an admission, all the rest is mere form; and therefore any act of the lord showing his consent to the surrender, amounts to an implied admittance; but still the admission must be regularly entered on the court-rolls. Gilb. Ten. 282.

45. The mere acceptance of a surrender by the steward, and the entry thereof in the court-rolls, with the delivery of a copy of such entry to the surrenderee, will not amount to an admittance.

46. A copyholder surrendered out of court, according to the custom of the manor, and the surrender was presented at the next court, and an entry thereof made by the steward thus,—*Compertum est per homagium, &c.*; but there was no admittance. Rawlinson v. Green, Poph. 127.

It was determined, that this entry on the rolls did not amount to an admittance. 1st. Because the acceptance of the presentment by the steward from the homage was no more than what he was bound to do, as being judge of the court. 2dly. Because the entry of it on the roll was but an office of duty, being but evidence to the court, as also to him to whose use the surrender was made; and so was the delivery

of the copy to the surrenderee. But none of these things did imply the consent of the lord that the *cestui que use* should be admitted to have the land according to the surrender; and all these things together did not imply an admittance; for all of them might be done, though no admittance were in the case.

Tit. 10. c. 4. § 10. Doe v. Whitbread, 5 East, 522.

47. It has been stated, that the admittance of a tenant for life is an admittance of the persons in remainder; because the estate for life and the remainder only constitute one estate of inheritance.

2 Term R. 484.

48. A mandamus will be granted by the Court of King's Bench to compel the lord of the manor to admit a person, to whom a copyhold has been surrendered.

Who may admit. Tit. 10. c. 2. § 4.

49. We have seen that in the case of voluntary grants of copyholds, every lord of a manor *pro tempore* may make such grants, and admittances in consequence thereof: but in the case of admittances upon surrenders, this doctrine is carried still farther, because the lord is only deemed an instrument to admit the *cestui que use*, and no more passes to the lord than is necessary to serve the limitation of a use: so that no respect is had to the quantity or quality of his estate in the manor; for whether it be by right or by wrong, admittances made by him can never be called in question on account of any defect in his title, because they are judicial acts, which every lord is bound to do.

1 Inst. 59 *b.* 4 Rep. 24 *a.* Co. Cop. § 41.

The Admittance must be according to the Surrender. Co. Cop. § 41.

50. As the lord has only a customary power to make admittances, according to the terms of the surrender, and is nothing more than a mere instrument; it follows, that if there be any variance between the admittance and the surrender, either in the person, the estate, or the tenure, or in any other point, the

admittance is good, so far as the lord has executed his power; but where he exceeds it, he acts without authority, and therefore the excess is void.

51. Thus, Lord Coke says, if A. surrenders to the use of I. S. for life, and the lord admits him in fee, an estate for life only passes. So if a person surrenders without mentioning any certain estate; because by implication of law an estate for life only passes; though the lord admits in fee, no more passes than the implication of law will warrant. If a person surrenders with the reservation of a rent, and the lord admits, not reserving any rent, or reserving a less rent than was reserved on the surrender, the admittance would be wholly void: but if the lord reserved a greater rent, then would the reservation be void only for the surplusage; and the admittance so far good, as it agreed with the surrender. If a surrender was made upon condition, and the lord omitted the condition, the admittance would be wholly void; but if the surrender was absolute, and the lord's admittance conditional, the condition would be void, and the admittance, in all other respects, good.

Idem. 4 Rep. 29.

Vide infra.

52. A surrender and admittance, when made pursuant to the custom of the manor, operate as effectually in transferring a copyhold estate, as a feoffment or any other common law assurance can operate in transferring an estate of freehold.

Effect of a Surrender and Admittance.

53. It is laid down by Lord Coke, that a surrender, where by a subsequent admittance the grant is to receive its perfection and confirmation, is rather a manifesting of the grantor's intention, than of passing away any interest in the possession; for, till admittance, the law takes notice of the grantor as tenant, and he shall receive the profits of the land to his own use, and

Co. Cop. § 39.

shall discharge all services due to the lord; yet the interest is in him but *secundum quid*, and not absolutely, for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender: neither in the grantee is any manner of interest invested before admittance; for if he enter, he is a trespasser, and punishable in trespass; and if he surrender to the use of another, the surrender is merely void, and by no matter *ex post facto* can be confirmed. But though the grantee hath but a possibility upon the surrender, yet this is such a possibility as is accompanied with a certainty; for the grantee cannot possibly be deluded or defrauded of the effect of his surrender, and the fruits of his grant: for if the lord refuse to admit him, he is compellable to do it by a *subpœna* in Chancery; and the grantor's hands are ever bound from the disposing of the land any other way, and his mouth is ever stopped from revoking or countermanding his surrender.

The Admittance relates back to the Surrender.

54. This doctrine has been in some degree altered by determinations, in which it has been established that the surrender is the substantial part of the conveyance, and a complete execution of the contract, as between the vendor and vendee; that the admittance must be pursuant to the surrender, and consequently must relate to it; but that the estate of the surrenderee is complete to many purposes before admittance.

1 Inst. 59 *b.* Porter v. Porter, Cro. Ja. 100.

55. Thus Lord Coke, in his Comment on Littleton, says, if two joint tenants be of copyhold lands in fee, and one out of court, according to the custom, surrenders his part to the use of his last will, and devises it to a stranger in fee, and dies, and at the next court

the surrender is presented, by the surrender and presentment the jointure was severed; for by relation the state of the land was bound by the surrender.

56. In ejectment a special verdict was found, viz. a custom that the tenants of the manor, having a mind to alien, might surrender into the hands of two copyholders, &c.: that Scott, being a copyholder in fee, did surrender, &c. to the use of the plaintiff in fee, and died, leaving his wife, who claimed her free bench by the custom: that at the next court the surrender was presented, and thereupon the plaintiff admitted. The question was, whether the surrenderee, or the wife, for her free bench, should have the lands. Benson v. Scott, 1 Sdk. 185.

It was adjudged for the plaintiff: for the wife's title did not commence till after the death of the husband, and then only to those lands of which he died seised. But the plaintiff's title began by the surrender, for the admittance related to that: and that the case of the two joint tenants, 1 Inst. 59 *b.* ruled this case.

57. In consequence of these principles, it was resolved in a modern case, that where a free copyhold was surrendered to a man and his heirs, who died before admittance, his widow was entitled to free bench.

58. Richard Kent being tenant in fee simple of the premises in question, which were held by copy of court-roll according to the custom of the manor, but not expressed to be at the will of the lord, contracted to sell the same for a valuable consideration to John Atkins, and surrendered them out of court to the use of the said John Atkins and his heirs, who entered into possession. John Atkins died without being admitted, and before the surrender was presented, no court having been held till after his death. The Vaughan v. Atkins, 5 Burr. 2764.

custom of the manor, with respect to the widow's estate was, that if the husband died seised, his widow had a right to be admitted to the land as her free bench during her widowhood. The question was, whether the widow was entitled to free bench?

It was argued for the heir at law of John Atkins that the custom under which the widow claimed, and which was free bench, was considered by all authorities, particularly Hobart, 181. as a part, fruit, or excrescence out of the estate of her husband: it was in fact the estate of the husband, which, for the benefit of the widow, was said to have continuance after his death, for a period of time prescribed by the particular customs of particular manors; in some, during the widow's life; in others, during her widowhood only. To have continuance, it must first exist; but it did not exist till the husband was a complete copyholder; and he was not a complete copyholder till, in the language of the custom, he was seised.

For the true idea of seisin, resort must be had to the ancient system of feudal tenures: by that system, seisin was a technical expression to describe the completion of the investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass: *sciendum est feudum sine investitura nullo modo constitui posse.* Without this seisin, nothing more than a naked possession was acquired. In the conveyance of freeholds, where it was by feoffment, the investiture was completed by livery: in the conveyance of copyholds, after surrender, it was completed by admittance. And no case was to be found where admittance was not deemed as necessary to complete the investiture in the conveyance of a copyhold, as livery was of a

freehold, where it passed by feoffment; or as enrolment, where it was conveyed by bargain and sale.

Upon these principles, therefore, that no estate of this sort could pass unless the investiture was completed, and that the investiture could not be completed without admittance, it was insisted that John Atkins did not die seised, and therefore that his widow was not within the custom: that she had no right to be admitted under it, and for that reason could have no right to retain the premises against the heir.

On the other side it was contended for the widow, that if the death of the *cestui que use* before admittance did not alter the nature of the estate transferred by the surrender, the widow must have the same title as if the husband had been admitted: and if the admittance had a relation to the time of the surrender in all respects, and even so far as to defeat all mesne acts between the surrender and the admittance, it would follow that the admittance of the heir must have relation back to the time of the surrender, so as to give the *cestui que use* a complete title, and to give his estate all the incidents which would have accompanied it, if they had happened at the same moment; and consequently that the widow, who would have been entitled if they had in fact so happened, should have a right to the fiction of law, especially against the heir.

Lord Mansfield delivered the opinion of the Court. He said the question was, whether the heir of the surrenderee, who died before admittance, should avoid the free bench, or customary dower of the widow, because he died before admittance. In this case the contract was for a purchase and sale; the surrender was the substantial part of the conveyance,

and a complete execution of the contract, as between the vendor and vendee. The surrender and admittance were different parts of the same conveyance; the formal effectuated the substantial part, and therefore must relate to it; both together made but one conveyance. The admittance must be pursuant to the surrender, and consequently must operate as from the date of it.

ante, § 56. He cited the case of Benson v. Scott, and the case in 1 Inst. 59 *b*. He said, it was laid down that the

4 Rep. 49 *b*. lord was only an instrument: that after admittance the surrenderee was in by him who made the surrender: that although the surrenderor, or the tenants by whose hands the surrender was made, died, yet presentment and admittance afterwards was good: and where he to whose use the surrender was made, died before admittance, his heir should be admitted. The true reason was drawn from the context, and

Tit. Copyhold (G.) § 8. given in Bacon's Ab.—"for upon admittance the estate is in *cestui que use*, from the time of the surrender, by *relation*."

1 Roll. Ab. 627. pl. 9. That Moore's case, Trin. 40 Eliz. referred to by Justice Newdigate in the case of Blunt v. Clarke, was not stated, nor did it appear what the question was. The proposition in Roll's Ab. that the heir being admitted is in by the lord, and not by him that made the surrender, was contrary to truth, and to all the authorities: the lord was a mere instrument, and could not vary from the surrender. And in the same case of Blunt v. Clarke, reported afterwards in the

2 Sid. 61. same book, Glynn, Ch. Just. says—"If a man seised of copyholds in borough english, surrenders to the use of J. S. and his heirs, and J. S. dies before admittance, leaving two sons, the younger of them shall have the land, because he is in by descent, or

at least by force of the first surrender, and so in nature of a descent."

That it was said in the Treatise of Tenures ascribed to Lord Ch. B. Gilbert, and he supposed written by him, that this opinion seemed to be very reasonable, "for heirs was certainly there a word of limitation, and not of purchase, and certainly there is as much reason to adjudge the heir in by descent here, as there is to adjudge an heir in by descent where a recovery was had against the ancestor, but not executed till after his death; because the use might have vested during the life of the ancestor; and because the execution hath a retrospect. And in truth the case of a surrender is just the same; for admittance might have been in the life of the ancestor, and when it was had, it had a retrospect."

That with this reasoning the Court agreed, and were of opinion, that upon admittance the heir was in by descent from the surrenderor, to which the admittance related.

The lessor of the plaintiff in this case was expressly admitted as heir. The law cast the free bench on the widow, just as it cast the descent upon the heir. The admittance by relation made her husband seised from the date of the surrender.

There was no rule better founded in law, reason, and convenience than this,—"That all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part, by *relation.*" Livery related to the feoffment; enrolment to the bargain and sale; a recovery to the deed which leads the uses; so admittance should relate to the surrender, especially when it was a sale for a valuable consideration, as in this case.

The title was not complete till admittance, and to the lord it was material in respect of his fine; but as between the parties, the vendor and vendee, the admittance was mere form. This agreement was executed, and the land bound by the surrender. The lord was compellable by *mandamus*, or decree, to admit; the vendor, his widow, his heir, and all claiming under him, were concluded from saying, after admittance, that the land did not pass from the day of the surrender. Upon this ground the lessor of the plaintiff claimed the inheritance whereof his brother died seised; it should not be in his mouth to say, against the widow, that his brother did not die seised. Judgment for the widow.

Holdfast v. Clapham, 1 Term R. 600.

59. The doctrine laid down by Lord Mansfield in the preceding case has been fully confirmed by a subsequent determination of the Court of King's Bench, in which it was held, that the title to copyhold lands relates back from the time of the admittance to the surrender, as against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor, on a demise laid between the times of the surrender and admittance.

Surrendersby way of Mortgage. Wade's Case, 5 Rep. 114.

60. Copyhold estates may not only be surrendered to the use of another person absolutely, but also upon condition that if the surrenderor pay the surrenderee a particular sum of money on a given day, the surrender shall be void; and in all cases of this kind, the surrenderor continues to be the legal tenant till the mortgagee is admitted.

Doe v. Wroot, 5 East, 132.

2 Ves. 300.

61. It is said by Lord Hardwicke, that mortgages of copyholds were constantly in the following manner:—A conditional surrender was made; and if that surrender was not presented, the general custom of the manor being that it became void, a new surren-

der was made; and the lord did not become entitled to a fine on these surrenders, because they were only intended as a pledge for securing the repayment of the money advanced. Skin. 142.

62. If the person to whose use the surrender is made is admitted, he thereby acquires the legal estate; and upon payment of the money, he must surrender back the premises to the mortgagor. Doe v. Morgan, infra.

63. In the case of a mortgage of a copyhold, the equity of redemption will follow the custom as to the legal estate, as it does in burrough english lands; which, if mortgaged, the equity of redemption will descend to the youngest son, to whom the legal estate would have descended. Fawcett v. Lowther, 2 Ves. 300. Tit. 15. c. 3. § 8.

64. Although a surrender, by way of mortgage, be not presented, yet it will be a lien on the estate in equity; and will be good against the assignees of a bankrupt. Taylor v. Wheeler, Tit. 15. c. 5. § 20.

65. A mortgagee of a copyhold will not be allowed to tack a judgment debt to that due upon the mortgage, because copyholds are not subject to an execution upon a judgment. Tit. 14. § 79.

66. Upon a bill by the heir of the mortgagor, to redeem a mortgage of copyhold lands, upon payment of the principal and interest due, the defendant insisted to have a judgment, which had been assigned to him, first satisfied, before the paintiff should be let in to redeem. Cannon v. Pack, 6 Vin. Ab. 222.

Lord Harcourt said, copyhold lands were not liable to a judgment, and therefore the judgment should not be tacked to the mortgage in this case; but the plaintiff should redeem upon payment of what was due on the mortgage, without satisfying the judgment. Tit. 15. c. 5. § 20.

67. Where a third mortgage is made of a copyhold to the steward of the manor, he shall not, by purchasing in the first mortgage, gain a priority over the second; because, as steward, he must have had notice of it.

Brothers v Bence, Fitzgib. 118.

68. A. being a copyholder in fee, mortgaged his copyhold by surrender to B., who was admitted by J. S. the steward of the manor. Afterwards, A. mortgaged the same copyhold to D., and afterwards to the steward of the manor himself, who then purchased in the first mortgage.

Lord King decreed that J. S. the steward, by the purchase in of the first incumbrance, should not postpone the middle mortgagee, but that he should be satisfied in order of priority, after the first mortgage discharged, since J. S. must have had notice of the mesne mortgage at the time of the mortgage made to him, he being steward of the manor when D. was admitted.

2 Atk. 101.

69. A mortgagee who is not in possession may bring his bill against a mortgagor, before admittance, for a decree of foreclosure; and after he has obtained such a decree, may bring his ejectment for the possession of the mortgaged premises.

A Surrender will not destroy a contingent Remainder. Tit. 16. c. 6. Fearne Con. Rem. 469. Mildmay v. Hungerford, 2 Vern. 243.

70. A surrender of a copyhold estate will not destroy a contingent remainder limited thereon, because the legal freehold, which is in the lord, will support such remainder.

71. Thus, where copyhold estates were devised to A. for life, remainder to his first and other sons in tail, &c., remainder to B. in fee; A. before he had any sons born, bought the reversion of B., and had it surrendered to his (A.'s) own use, thinking by that means to merge his estate for life, and so destroy

the contingent remainder to his first and other sons.

It was however agreed, that this surrender of the reversion would not bar the son, because the freehold and inheritance were in the lord; for there was not the like inconvenience as in freehold estates at common law, in respect of the contingent remainders, where there was nobody against whom to bring a *præcipe*.

72. Lord Ch. B. Gilbert says, "Copyholder for life, remainder to another in fee, the first copyholder commits a forfeiture, he in remainder shall not enter, but the lord shall hold it during the life of the first copyholder; for copyhold estates are not like those at common law, for in copyhold cases the remainder is to commence after the death of tenant for life, and not after his estate or interest is gone." Ten. 244.

73. In a subsequent page, he says, "It is made a doubt whether, by the destruction of the particular estate, the remainder that is in contingency be destroyed. As to this point we ought to distinguish, for it seems some are, and some are not; as, for example, if an estate be given to a copyholder for life, the remainder to the right heirs of J. S., if the tenant for life die, living J. S., there it seems clear that the remainder is destroyed; for it cannot take effect, as by the limitations it ought. But then, if tenant for life in that case had committed a forfeiture, or made a surrender, and then, living tenant for life, J. S. had died, it seems to be very clear that his right heir might take; for his estate in remainder was not to take effect after the determination of the interest of tenant for life, but after his death; and when that happened, he was capable to take." 265. Vide Fearne Cont. R. 471.

A Surrender and Resurrender alters the Descent.

74. Where a copyhold has descended *ex parte materna*, a surrender and re-surrender will alter the descent, and make them descendible to the heirs *ex parte paterna*.

Doe v. Morgan, 7 Term Rep. 103.

75. A person being seised in fee of a copyhold estate, which had descended to him *ex parte materna*, surrendered it to the use of himself and his assigns for life, remainder to the use of such persons, and for such estates, as he should by deed or will direct. He afterwards surrendered to the use of a mortgagee in fee, who was admitted. The mortgagor paid the mortgage money; and the heir of the mortgagee, who was an infant, by virtue of an order of the Court of Chancery, surrendered the premises into the hands of the lord, to the use of the mortgagee, who was admitted.

Lord Kenyon held this to be like a feoffment and re-enfeoffment, which, it had long been settled, broke the line of descent, and consequently the heir *ex parte paterna* was entitled to recover.

Construction of Surrenders. Vide Tit. 32. c. 19. § 106.

76. The same rules are adopted in the construction of surrenders as in that of grants; and therefore, where a particular thing is once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation mistaken or false respecting it, will not frustrate it; but where the surrender is in general terms, there the addition of a particular circumstance will operate by way of restriction and modification of such surrender.

Roe v. Vernon, 5 East, 51.

77. Thomas Earl of Strafford having several customary tenements held of the manor of Wakefield, some of which were compounded and others uncompounded, surrendered to the use of his will all and singular the lands, tenements, &c. whatsoever in the

manor, which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of 4*l.* 10*s.* 8$\frac{1}{2}$*d.*, and compounded for. It was held, that the words *and compounded for*, restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor, and that the words *being of the yearly rent*, &c., which were not referable to any actual amount of the rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction. Goodright v. Pear 11 East, 58.

78. The uses of surrenders are generally declared in the surrender, which is entered on the court-rolls; though Lord Hardwicke held, there was no necessity of a declaration of uses of a surrender in the court-rolls, and that where the steward endorsed the uses on the back of the surrender, it was sufficient. But where copyholds are surrendered to trustees, the uses are declared by a separate instrument, which is never entered on the court-rolls, and in that case the legal estate remains in the trustees, copyholds not being within the statute of uses. 1 Atk. 74.

79. The construction of the uses declared on a surrender of a copyhold estate was not formerly so strict as that of a common law conveyance, especially where there had been a custom in the manor of construing surrenders in a particular manner.

80. Thus, where the surrender is general, without any words of limitation, the surrenderee will take an estate for life; but if there be a special custom in a manor, that the words *sibi et suis*, or *sibi et assignatis*, &c. shall create an estate of inheritance, they will be allowed to have that effect. Co. Cop. § 49. 4 Rep. 29 *b.* Gilb. Ten. 258.

Brown v. Foster, Cro.Eliz.392.

81. A custom that where a copyholder surrenders to the use of another, without expressing any estate, the lord may grant it in fee to the person to whose use the surrender was made, was held to be good; for the interest of the land being between the lord and the copyholder, it was not unreasonable that upon such an uncertainty the lord should ascertain it.

Cop. § 49.

82. Lord Coke says, if a copyhold be surrendered to a man, *et semini suo hæreditabili de corpore*, or to a man, *et hæredibus ex ipso procreatis*, or to a man in frank marriage, with his wife, an estate tail will pass: in the first, without the word heirs; in the second, without the word body; and in the third, without either.

Seagood v. Hone, Cro.Car.366.

83. It was however resolved, in the reign of King Cha. I. that an estate tail should not arise by implication, upon a surrender of a copyhold: as, where a copyholder surrendered to A. and B., and the longer liver of them, and, for want of issue of the body of A., the lands to remain to the son of J. S. It was resolved, that A. had but an estate for life, and being so by express limitation, no greater estate should arise to him by implication.

1 P.Wms. 14. Tit. 32. c. 21. § 55.

84. In the case of Fisher v. Wigg, Justice Gould said, that surrenders of copyhold lands to uses shall have the same favourable construction as wills, and are not to be tied up to the strict rules of the common law, but expounded according to the intent of the party.

This principle was opposed by Lord Holt, who held, that surrenders of copyholds must be governed by the same rules as conveyances at common law. In the case of Idle v. Cook, which arose a few years after, Lord Holt and the other Judges appear to

1 P.Wms. 70. 2 Ld. Raym. 1144.

have agreed in opinion, that the construction of a surrender ought to be the same as that of a feoffment or any other deed; and Justice Powell said, "We have gone too far already in helping the intention of the parties, in construction of limitations, and have made estates so uncertain, that lawyers do not know how to advise purchasers. I cannot consent to carry it any farther."

85. This doctrine has been confirmed by Lord Hardwicke, who has said, that surrenders of copyholds are to be construed as deeds and conveyances at common law, and not as a will. 2 Atk. 101. 3 — 12.

86. In the construction of surrenders, the word *or* will be construed *and*, if necessary to effectuate the intention of the parties.

87. A person surrendered a copyhold to the use of himself for life; and from and after his decease, to the use of his wife during her widowhood; and after his decease, and upon the marriage of his wife, then to the use and behoof of William Wallis, for his natural life, and from and after his decease, to the use of the issue of his body lawfully to be begotten; with a *proviso*, that in case W. Wallis should die in the lifetime of the surrenderor, *or* without issue of his body, then all the surrendered premises should go to the right heirs of the surrenderor for ever. W. Wallis died in the lifetime of the surrenderor, leaving issue, who brought an ejectment; and the question was, whether they were entitled to this copyhold. Wright v. Kemp, 3 Term R. 470.

Lord Kenyon said, the questions were, What was the intention of the parties to the surrender? whether they had expressed it in legal terms? and if so, whether any rule of law would be violated in giving effect to it? There was no doubt but that a surrender was considered as a common law conveyance,

and was not entitled to the same favourable construction as a will; and therefore, unless the surrenderor had used the language which would confer a legal estate, it could not be conferred. In deeds, certain legal phrases must be used in order to create certain estates, as the word *heirs*, to create a fee, and *heirs of the body*, to create an estate tail. But beyond that, he would say with Lord Hardwicke, that there was no magic in particular words, further than as they showed the intention of the parties. Now here it was impossible to entertain any doubt. S. B. surrendered the estate to the use of himself for life, then to his wife during her widowhood; then, that is, in case her estate for life was put an end to by doing this act, which he meant to guard against, to her son W. Wallis for life; and after his decease, to the issue of his body. Therefore he could not accede to what was said by the defendant's counsel, that this was a contingent remainder in W. Wallis; for it was vested, though he cautiously avoided saying what the limitation to his issue was. The surrender then proceeded to state a *proviso*, that in case W. Wallis should die in the lifetime of the surrenderor, *or* without issue of his body, the estate should go to the right heirs of the surrenderor, and here the question arose on the word *or*; there was no doubt of the intention of the parties, and where sense required it, there were many cases to show, that the Court might construe the word *or* into *and*, and *and* into *or*, in order to effectuate the intention of the parties: here therefore, in order to give effect to the intention of the surrenderor, the Court must say that when he used the word *or*, he meant *and*, and there was no case in which any difference had been made, as to this point, between a will and a deed, when

2 Stra. 1175. 3 Atk. 390.

the Court were considering how the intention of the parties could be effected. Then, without deciding what interest the lessors of the plaintiff had, at all events, they had a sufficient title to maintain the ejectment.

88. The rule established in Shelley's case takes place in the construction of surrenders of Copyholds; and therefore, where a person surrenders a copyhold to the use of himself for life, remainder to another in tail, remainder to his own right heirs, there the heirs shall take by descent.

Vide Tit. 32. c. 22. Gilb. Ten. 270. Highway v. Banner, Tit. 32. c. 22. § 40.

89. Mr. Fearne observes, that in a case noticed by Atkyns, upon a surrender of a copyhold to the use of the husband for life, then of the wife for life, and of the heirs of the bodies of the husband and wife, remainder in fee to the use of the survivor, it is said the limitation did not vest an absolute estate tail in the wife, who survived, but only gave her an estate tail after possibility of issue extinct, and that the estate tail vested in the person who was heir of the bodies of both husband and wife; that the reasons for this opinion were not mentioned, nor was it stated to be the resolution of the Court, nor did it appear whether that point entered the question then before the Court, and that it was no easy matter to account for such an opinion. The limitation to the heirs of the bodies of the baron and feme must either have been executed in the baron and feme jointly, as an estate tail in possession, or have vested in them jointly as a remainder, unless it could have been held a contingent limitation to the heir of both their bodies. In neither of the two first cases could the wife be tenant in tail after possibility of issue extinct, so long as any issue of her body by her deceased husband was living; and if there was any such issue then

Cont. R. 80. Sutton v. Stone, 2 Atk. 101.

living, it could not vest in such issue till her death. In the third case, she could take no estate tail at all, and consequently, could not be tenant in tail after possibility of issue extinct; the only cases in which she could be tenant in tail after possibility of issue extinct were those two, in which it was impossible there should then be any such person as the heir of both their bodies. The question being upon a surrender of a copyhold, made no difference in the construction, as it was agreed in the same case that surrenders of copyholds should be construed in the same manner as conveyances at common law. Now, under a similar limitation at common law, he apprehended, the husband and wife taking distinct and successive estates for life, the joint limitation to the heirs of their bodies would not have been executed in them in possession, but would have been vested in them jointly as a remainder in tail; that this remainder surviving to the wife upon the decease of her husband, would have merged her estate for life, so as to make her tenant in tail in possession; but she having had no issue by her deceased husband, or such issue being then extinct, would thereby have become only tenant in tail after possibility of issue extinct.

1 Inst. 27 *b.*

Tit. 32. c. 22. § 11.

Roe v. Aistrop, 2 Black. R. 1228.

90. Charles Aistrop the father being seised in fee of a freehold estate, and also of the premises in question, being copyhold of inheritance, descendible to the youngest son, settled his freehold previous to his marriage to the use of himself and Ann his intended wife for their lives and the life of the survivor, and after their decease, to the use of the heirs of the body of the said Charles on the body of the said Ann to be begotten, with remainder to his own right heirs; and also covenanted to surrender his copyhold "to the use of himself and his

said intended wife, and the heirs of their two bodies to be begotten, in like manner, and to the same uses, as the freehold lands and tenements therein-before mentioned were settled and conveyed."

The copyhold was surrendered to the use of the husband and wife for their lives, and the life of the survivor; and after their several deceases, to the use of the heirs of their two bodies lawfully begotten or to be begotten; and for want of such issue, to the husband, his heirs and assigns for ever. The husband and wife were admitted acordingly, and died, leaving issue two sons. The question was, to which of the sons the copyhold went.

Lord Ch. Just. De Grey said, it was a mighty clear case. There was reason indeed to suppose that the parties might not mean the two estates to go in a different channel; but this was only a supposition; and if certain, still as this was a legal estate, it was not in the power of the parties to alter the legal course of descent. It was an estate executed, and seemed to be an estate tail in the father and mother. Had it been executory and upon articles, then, according to Lord Hardwicke's doctrine in the case of Roberts v. Kingley, the Court might have considered the word *heir* as a word of purchase, but in the present case, it was impossible. Tit. 32. c. 22. § 52.

Sir W. Blackstone said he thought the freehold was clearly vested in the father only, in special tail; the copyhold in both father and mother: so far there was a difference made in the outset, notwithstanding the words "in like manner," &c. But he conceived there appeared no intention in favour of either son exclusively, they were left to the disposition of the law. The heir was intended to succeed, but who that heir should be, must be left to the legal course

of descent. In the freehold, it was the eldest son; in the copyhold, the youngest; and had there been only two daughters, both would have succeeded in both. "In like manner," &c. only meant that both estates should be entailed. Judgment for the youngest son.

Cont. Rem. 84.

91. Mr. Fearne has observed on this case, that it related to an actual legal settlement before marriage, in respect of the freeholds, and therefore the limitation of those lands was not open to the construction of articles, to be carried into strict settlement; and the settlement of the copyholds, though resting on the covenant for surrender, seemed intimately blended with that of the freehold, as part of one and the same settlement. Besides that the limitations of the surrender agreed upon were expressly referred to the same manner and uses as the freeholds were settled, and therefore could not, consistently with the express terms of such a stipulation, be limited in strict settlement on the issue, as purchasers, when the settlement of the freeholds gave an estate tail to the parent. And there was no other construction by which the descent of the lands to the youngest son could be avoided. This took it out of the authority of the cases where marriage articles were carried into execution by way of strict settlement; and accounted for the distinction, by the Chief Justice, between this case, as of an estate executed, and one executory on articles.

Tit. 32. c. 22. § 49.

Fearne Cont. Rem. 85.

92. Where an estate for life is limited, either to the father or mother only, and the subsequent limitation is to the heirs of both their bodies, the construction is the same in regard to copyholds as to freeholds: namely, the subsequent limitation does not vest in the ancestor taking the estate for life, but

Tit. 32. c. 22. § 15.

is a contingent remainder to the heirs of the bodies of both father and mother.

93. A person surrendered copyhold lands to the use of D. and of the wife of A. for their lives, and afterwards to the use of the heirs of the bodies of A. and his wife. Lane v. Pannel, 1 Roll. Rep. 238.

Upon a question in ejectment, whether this subsequent limitation to the heirs of the body of A. and his wife, vested an estate tail in the wife of A., it was held that it did not, but was a contingent remainder to the heirs of both their bodies.

94. John Robinson surrendered a copyhold estate, *ad opus et usum Mariæ Arnall quam in uxorem ducere intendit, et hæredibus eorum duorum corporum legitimè procreatis, et pro defectu talis exitus, ad opus et usum rectorum hæredum prædicti Johannis Robinson.* Mary Arnall was admitted, *tenendum sibi et hæredibus eorum duorum corporum legitimè procreatis,* remainder to the right heirs of John Robinson. The Court of Common Pleas was of opinion that the wife took only an estate for life, with a contingent remainder to the heirs of the bodies of the husband and wife. Frogmorton v. Wharrey, 2 Black. R. 728.

95. In a case in 30 Eliz. Lord Coke held that where a person surrendered a copyhold to the use of himself for life, remainder to another in tail, remainder to the right heirs of the surrenderor, there his heirs should be in by descent; contrary where the surrenderor had not an estate for life or in tail limited to him; for there his heir should enter as a purchaser: as if such use had been limited to the right heirs of a stranger, which was contrary to the rule in freeholds; for in that case where the estate moves from the grantor, the ultimate limitation to his heirs general, though the ancestor takes no preceding freehold, will Allen v. Palmer, 1 Leon. 101. Tit. 11. c. 4. § 34.

be a reversion in him, and part of the old estate, and the heir will take it by descent.

Cont. Rem. 87.

96. The only ground (says Mr. Fearne) upon which Lord Coke's opinion in the preceding case can be accounted for, is, the supposition that an entire new estate was created, and derived under the uses of the surrender, throughout the whole of them; and that no estate taken under those uses was any part of the old estate: but that this notion had been entirely exploded by modern decisions.

Gilb. Ten. 272.

Roe v. Griffith, 4 Burr. 1952.

97. B. North surrendered a copyhold, to the use of himself and his heirs, till the solemnization of his marriage, then to the use of himself for life, remainder to his wife for life, remainder to trustees to preserve contingent remainders, remainder to the children of the marriage, in such manner as B. North should appoint; in default of appointment, to the heirs of the body of B. North by his intended wife, and in default of such issue, to the said B. North, his heirs and assigns for ever.

Lord Mansfield held that though B. North had limited the reversion in fee to himself, yet the words did not operate; for the use resulted by operation of law. And all the Judges agreed that after the surrender to the uses of the settlement, the reversion still continued in the husband; and that no alteration or change of estate happened in this case.

Thrustout v. Cunningham, Tit. 38. c. 4.

Vide Fearne Cont. Rem. 416.

Tit. 16. c. 5.

98. It appears somewhat doubtful whether limitations in the nature of springing and shifting uses are good in surrenders of copyholds. It may be observed, that if limitations of this kind are not good, great inconveniences must arise, as the usual practice, for a long time past, has been to insert a covenant in marriage settlements, to surrender copyholds to the

same uses to which the freehold estates are limited, and in most of such settlements there are springing and shifting uses.

A Surrender is sometimes supplied in Equity.

99. It has been long settled that a court of equity will supply the want of a surrender of a copyhold estate, in favour of a purchaser for a valuable consideration, against the party who ought to make the surrender, and also against his heir.

Barker v. Hill, 2 Cha. R. 218.

100. A. contracted with B. for the purchase of a copyhold estate, and paid the purchase money, and B. agreed to surreuder the premises at the next court, but died before a court was held, or any surrender made. Upon a bill in Chancery by the purchaser against the heir, the Court decreed that he should surrender the premises as soon as he came of age.

101. A mortgagee being a purchaser *pro tanto*, a surrender of a copyhold will also be supplied in his favour, by the Court of Chancery; even against a purchaser who has been admitted.

Jennings v. Moore, 2 Vern. 609. Blenkarne v. Jennings, 2 Bro. Parl. Ca. 278.

102. A. lent B. 200*l.* on a surrender of some copyhold lands, which A. neglected to get presented at the next court, by which it became void. B. afterwards sold the same lands to J. S. who took a surrender, which he presented, and was admitted. But it appearing that he had notice of A.'s right, it was decreed that A.'s defective surrender should be made good; and on an appeal to the House of Lords the decree was affirmed.

Patteson v. Thompson, Finch, 272.

Vane v. Fletcher, 1 P. Wms. 352.

103. In the case of a voluntary conveyance, a court of equity will not supply the defect of a surrender against the heir, unless he has done something to prevent the acceptance of the surrender.

104. Courts of equity will also supply the defect of a surrender to the use of a will, in many cases; of which an account will be given in the next title.

Agreement to surrender.

Tit. 32. c. 1. § 31.

2 Freem. 65.

105. An article or agreement in writing, executed according to the statute of frauds, to surrender a copyhold estate, is good; and the person entering into it, and his heirs, will be bound by it as fully as by an agreement to convey a freehold estate.

TITLE XXXVII.

ALIENATION BY CUSTOM.

CHAP. II.

How Entails of Copyholds may be barred, and the Effect of Releases.

2. *Forfeiture and Regrant.*
7. *Recovery in the Manor Court.*
15. *Effect of such a Recovery on the Descent.*
17. *How such Recoveries may be reversed.*
24. *Within what Time.*
25. *Surrender.*
31. *A Custom to bar by Surrender or by Recovery is good.*
33. *A Grant of the Freehold will destroy an Estate Tail.*
38. *How an equitable Entail may be barred.*
41. *How conditional Fees are barred.*
44. *Effect of Releases.*

SECTION 1.

IT has been stated that copyhold estates may be entailed, where there is a special custom to warrant it; or rather that they may be limited to a person and the heirs of his body, with a remainder over: and that the statute *De donis conditionalibus* co-operating with the custom, will give to such an estate all the qualities of an estate tail. In consequence of which it has been determined, that entails of copyholds may be barred in several ways; for otherwise estates of this kind would be unalienable, which the law will not allow. Tit. 10. c. 1. § 47.

2. The modes of barring entails of copyholds are principally three: First, by forfeiture and regrant; Forfeiture and Regrant.

Gilb. Ten. 177.

as where a tenant in tail of a copyhold commits a forfeiture, in consequence of which the lord of the manor seises it, and grants it either to the old tenant or to another person, such grantee will acquire an estate in fee simple.

Pilkington v. Stanhope, Sid. 314.

3. Upon a trial at bar in ejectment, for lands held of the manor of Wakefield, it was admitted that by the custom of that manor copyhold lands might be entailed, and that the mode of barring such entails was, for the tenant in tail to commit a forfeiture, and then the lord made three proclamations, after which he seised the copyhold, and granted it to the copyholder in fee. Another custom to bar such entail was, for the tenant in tail to make a surrender to a purchaser in fee, and then for the purchaser, intending to bar the entail, and the remainders, to commit a forfeiture; then the lord to seise and make three proclamations, &c.: that thereby the issue in tail was barred, though the tenant in tail did not join; and this custom was found by the jury and allowed by the Court to be good.

Sty. R. 452.

4. This case is also reported by Style, who mentions that Lord Ch. J. Roll said he conceived there could be no custom for this, because the seizure for a forfeiture destroyed the copyhold estate; for it was at the lord's election, after the seizure, whether he would grant the estate again by copy of court-roll or not. But this effect of a forfeiture is sanctioned by the authority of the following case.

Grantham v. Copley, 2 Saund. 422.

5. On a trial at bar it was ruled by the court on evidence, that where W. Saville was tenant in tail of divers copyholds in the manor of Wakefield, and made a voluntary lease for 21 years, without licence of the lord, to commit a forfeiture; which was presented in the copyhold court, and the lands seised into the

hands of the lord, according to the custom of the manor; and W. Saville appointed the forfeiture to be for the benefit of Arthur Saville and his heirs. It being proved that there was a custom to commit such forfeitures, on purpose to bar the entails of copyholds, and to transfer the lands over to any other person; although A. Saville was not admitted by the lord in the lifetime of W. Saville, yet it was held that he had a good title; and the forfeiture was only in the nature of a surrender, or of a common recovery; and the lord could not admit any other than him to whom it was limited by the tenant so making such a forfeiture; but *cestui que use* after his admittance should have it, and the lord could not otherwise dispose of it: and whenever *cestui que use* was admitted, he should avoid all mesne acts or dispositions made by the lord, as he should if a surrender had been made to his use, and he had afterwards been admitted according to the surrender.

6. This custom of barring entails of copyholds by forfeiture and regrant is said to be peculiar to the manor of Wakefield. But Mr. Serjeant Williams observes, "It should seem that if there was a custom in any other manor, of barring an entail of a copyhold by forfeiture and regrant, it would be good; for what is a good custom in one manor, must necessarily be so in another." 2 Saund. 422 *b. n.* 1. 2 Ves. 604.

7. The second mode of barring entails of copyholds is by a species of common recovery, grounded on what Littleton says, (§ 76.) that plaints in the nature of writs of assize at common law, will lie in the lord's court, upon which a recovery might be suffered. Recovery in the Manor Court.

8. Thus in 23 and 24 Eliz. it was adjudged by the Court of Common Pleas, that where, by the custom of the manor, plaints had been made in the court of Browne's Case, 4 Rep. 23 *a.*

the manor, in the nature of real actions, against the tenant in tail, (admitting that copyhold land might be entailed) it should be a discontinuance, and should toll the entry of the heir in tail. For inasmuch as plaints in the nature of real actions were warranted by the custom, it was an incident which the law annexed to the custom, that such a recovery should make a discontinuance.

9. This determination only says that a recovery in the lord's court shall operate as a discontiuuance, and take away the entry of the heir. And Lord Ch. B. Gilbert observes, that a recovery with voucher does not, of common right, bar the entail of a copyhold; but that, as to the entailing of them, custom is requisite; so, without custom, the entail cannot be cut off. The reasons are, because without an intended recompence in value, no recovery shall bind, and the surrenderee comes in in the *post* by the lord, and is not in in the *per* by the party; and so no warranty can be annexed to the copyholder's estate. Besides, they have only an estate at will, to which no warranty can be annexed of common right; for no estate less than a freehold is capable by common right of having a warranty annexed to it. And accordingly it was adjudged in Clun's case; and all the Judges held that the recovery did not bind without a custom. But there is a *quere* whether judgment was given for the plaintiff upon the principal matter or not; for it seemed to have been a discontinuance, and then the defendant's entry could not be lawful. There were two other cases where this question came in dispute, but was not resolved. It was held in the case of Church v. Wyatt, that a recovery by custom might bar, which implied that without a custom it could not bar. But in the case of Oldcot v. Level,

Ten. 175.

T. Raym. 162.

Moor. 637.

Id. 753.

it was agreed that a recovery might be in the court of the lord, that would bar a copyhold; and there it was said generally, and was not put upon any custom.

10. The usual mode of suffering a common recovery in a copyhold court is thus: the tenant in tail surrenders it to some other person, to make him tenant to the *præcipe*, and then a plaint, in the nature of a writ of entry in the *post*, is brought against him, who vouches the tenant in tail, and he vouches over the common vouchee. Pigot, 103.

11. By the statute 47 Geo. III. sess. 2. c. 8. it is enacted, that it shall be lawful for every person, not being under coverture, and for every feme covert (being secretly examined), to appoint an attorney or attorneys for the purpose of surrendering the copyhold or customary tenements of which a common recovery shall be proposed to be suffered, to make him or them tenant or tenants to the plaint, and also to appoint any other person or persons to appear as vouchee or vouchees for suffering such recoveries; which shall be as good as if the parties appeared in person.

12. It was resolved by the Court of Common Pleas in 27 Cha. II. that where a tenant for life of a copyhold suffered a recovery as tenant in fee, it was no forfeiture of his estate; for the freehold not being concerned, and it being in a court-baron, where there is no estoppel; and the lord who was to take advantage of it, if it were a forfeiture, being a party, it was not to be resembled to the forfeiture of a free tenant; and that customary estates had not such accidental qualities as estates at common law, unless by special custom. Keen v. Kirby, 1 Mod. 199. 2 —— 32.

4 Rep. 23 *a.*

13. A recovery upon a plaint, in the nature of a real action against a tenant in tail, is a discontinuance, and takes away the entry of the heir in tail.

Oliver v. Taylor, 1 Atk. 474.

14. If lands are customary freeholds, and pass by surrender in a burrough court, it is said that a recovery of such lands suffered in the Court of Common Pleas may be good.

Effect of such a Recovery on the Descent.

15. It was resolved in a modern case, that a recovery of a copyhold has the same effect as a recovery of a freehold, with respect to the descent.

Roe v. Baldwere, 5 Term R. 104.

16. J. Younger being seised in fee of freehold and copyholds, devised certain parts of his estate to S. Atkinson in fee, and other parts to S. Atkinson for life, with remainder to E. Waterfield in tail. These two estates afterwards came to C. Bowker in tail, one of which she took by purchase, under a limitation to the daughters of E. Crow, the other by descent under the estate tail limited to E. Waterfield. C. Bowker being so seised in tail of the different parts of these estates, in different rights, suffered a common recovery, with her husband, of the whole; and a question arose on the effect of that recovery, as to the respective parts of the estate.

Lord Kenyon said, it seemed to have been admitted that the case of Martin v. Strachan decided this case, as far as it went. According to that case it stood thus: the common recovery put an end to the estate tail; the estate immediately afterwards became an estate in fee; and the party whose estate was converted into a fee, if he took the estate tail as a purchaser, must take the fee as a purchaser; or if he took the estate tail by descent, must take the fee also by descent, as from the same ancestor. A distinction, however, had been taken, between the operation of a common recovery respecting copy-

Tit. 36. c. 9. § 14.

holds, and freeholds. But it would lead to perplexity if different rules were applied to different sorts of estates. Copyhold estates were neither within the statute *De donis* nor that of uses; neither were they the subject of entails, unless there was a custom in the manor to warrant it, which was admitted in this case. It was in conformity to the rule respecting real estates, and to prevent any estate being unalienable, that the same rule was adopted in the case of copyholds, as a means of unfettering estates and to prevent perpetuities. And he knew of no authorities which made any distinction in this respect between copyholds and freeholds: in all other points where the lord of the manor was not prejudiced, the same rule of descent applied equally to both. That this case had been ingeniously argued on the forms of a recovery; and it had been compared, as to the copyholds, to a feoffment and re-feoffment. But this was by no means like the case of a feoffment and re-feoffment, and the Court could not enter into these forms; they were perhaps inexplicable; but they must be taken as a mere mode of conveyance by a tenant in tail, and ought to be so considered in all respects: it was so considered by the courts in Martin v. Strachan. Without, however, wasting time in going through the doctrine laid down by Lord Ch. J. Lee in that case, he thought the Court was bound to adopt the authority of it, and apply it to both these species of property. Therefore that part of the estate which the person who suffered the common recovery took by purchase, must go to the heir *ex parte paterna*; and that which she took by descent from the maternal ancestor, to the heirs *ex parte materna*.

How such Recoveries may be reversed. Fitz. N. B. 12. 1 Inst. 60 *a.* 4 Rep. 30 *b.* Edward's Case, 1 Roll. Ab. 539.

17. A common recovery suffered in a copyhold court can only be reversed by petition to the lord, in the nature of a writ of false judgment.

18. If an erroneous judgment be given in a *formedon* in a copyhold court where the King is lord, the party against whom the judgment is given may sue by bill or petition to the King, in the Exchequer Chamber, in the nature of a writ of false judgment, for the reversal of the judgment. For as, in the court of a common person, the proper suit for reversal thereof is to the lord by petition; so it is here to the King: and the Exchequer Chamber is more proper to sue in to the King by petition, than the Chancery, because it concerns the King's manor.

19. The Court of Chancery will not, however, compel a lord of a manor to receive a petition in the nature of a writ of false judgment, to reverse a recovery suffered thirty years before.

Smith v. Dean & Chap. of St. Paul's, Show. Parl. Ca. 67. 1 Vern. 367.

20. A bill was brought to compel the Dean and Chapter of St. Paul's, as lords of the manor, to receive a petition in the nature of a writ of false judgment, for reversing a common recovery suffered in the manor court above thirty years before; whereby a remainder in tail, which the plaintiff claimed, was barred; suggesting several errors in the proceedings, and praying that the said lords might be commanded to examine the same, and do right thereupon. To this bill the defendant Rugle demurred; and the Dean and Chapter, by answer, insisted that it was the first attempt of the kind, and therefore of dangerous consequence; and conceived it not fit to proceed on the said petition, unless compelled thereto by course of law. That Rugle being the person concerned in interest to contest the sufficiency of the common

recovery, they hoped the court would hear his defence and determine therein before any judgment were given against them; and that they were only lords of the manor to obey, &c.; and prayed that their rights might be preserved.

This demurrer having been allowed, an appeal was brought in the House of Lords, where it was contended on the part of the appellant, that this was the only remedy which he had; for as no writ of error or false judgment, lay for reversing a recovery or judgment obtained in a copyhold court, the only method was by bill or petition to the lord, in the nature of a writ of false judgment, which of common right he ought to receive; and to cause errors and defects in such recovery or false judgment to be examined. Ann. 1685.

That in all cases where any party, having a right to a freehold estate, was barred by a judgment, recovery, or fine; such party, of common right, might have a writ of error, if the same were a court of record; and a writ of false judgment, if in a court baron, or county court. And there could be no reason why a copyholder should be without remedy, when a false judgment was given; and the rather for that in real actions, as this was, the proceedings in the lord's courts were according to those in Westminster Hall. That though a common recovery was a common assurance, yet it was never pretended that a writ of error to reverse it was refused on that pretence; and if the lord of a manor refused to do his duty, the Court of Chancery had a jurisdiction to compel him thereto. That though common recoveries were favoured, and had been supported by several acts of parliament, yet no parliament ever thought fit to deprive the parties bound by such recoveries, of the benefit of a writ of error.

On the other side it was argued for the respondent, that the person who suffered the recovery had a power over the estate, that she might both by law and conscience, upon a recovery, dispose of it as she should think fit; that she had suffered a recovery, according to the custom of the manor, though not according to the form of those suffered in Westminster Hall. That the suffering of recoveries in any court, and the method of proceeding in them, were rather notional than real things; and in the common law courts, they were taken notice of, not as adversary suits, but as common assurances; so that even there, few mistakes were deemed so great, but what were remedied by the statute of *jeofails*, or would be amended by the assistance of the Court. And if it were so in the courts at Westminster, where the proceedings were more solemn, and the Judges were persons of learning and sagacity; how much rather ought this to stand, which was suffered in 1652, during the times of disorder, and most proceedings informal and in the English tongue, in such a mean court, where there were few precedents to guide them; where the parties themselves were not empowered to draw up their own proceedings, but the whole was left to the steward, who was a stranger to the person concerned; and therefore it was hard and unreasonable that men's purchases should be prejudiced by the ignorance, unskilfulness, or dishonesty of a steward, or his clerks. That there was scarce one customary recovery in England which was exactly agreeable to the rules of common law: that the questioning of this might, in consequence, endanger multitudes of titles, which had been honestly purchased; especially since there could be no aid from

the statutes of jeofails, for they did not extend to courts baron. That there was no precedent to force lords of manors to do as this bill desired, and the lords of manors were the ultimate judges of the regularity or errors in such proceedings. That there was no equity in the prayer of this plaintiff; that if the lord had received such a petition, and were about to proceed to the reversal of such recovery equity ought then to interpose, and quiet the possession under those recoveries: that Chancery ought rather to supply a defect in a common conveyance, and decree the execution of what each party meant and intended by it, than assist the annulling of a solemn agreement, executed according to usage, though not strictly conformable to the rules of law.

The appeal was dismissed, and the decree affirmed.

21. The determination in the above case can only be accounted for from the late period at which the recovery was attempted to be reversed; and from the circumstance of its having been suffered during the civil wars. It would be very dangerous to conclude from it that every lord of a manor has a discretionary power to receive or refuse a petition to reverse a recovery suffered in his court: for justice requires that a petition of this kind, when brought within a reasonable time, should be as much *ex debito justitiæ*, as a writ of error to reverse a recovery suffered in the Court of Common Pleas.

22. Where a recovery has been suffered of lands held in ancient demesne, in the lord's court, the proper mode of reversing it is by writ of deceit.

23. Thus, where a writ of deceit was brought to reverse a common recovery, suffered of lands which were held of the manor of *Havering ate Bower* in the county of Essex, which is ancient demesne, and

Rex v. Firebrace, Barnes, 258

of which the King is lord. The defendants confessed the action, and the Attorney General remitted damages, and prayed judgment. A rule was made for judgment *nisi causa*, which was made absolute on affidavit of service; no cause being shown.

Within what Time. Tit. 36. c. 11. § 25.

24. The statute 10 & 11 Will. III. c. 4. has been already stated, by which it is enacted, that all writs of error for reversing fines or recoveries must be brought within 20 years after such fine levied, or recovery suffered. It does not appear to have been determined whether this statute extends to petitions to reverse recoveries suffered of copyholds, or to writs of deceit to reverse recoveries suffered of lands held in ancient demesne. The late Mr. Serjeant Hill held that it did extend to petitions and writs of deceit; and gave the following reasons for his opinion: "The statute in question is a remedial law, and made for the quieting title and possessions under ancient fines and recoveries, as appears by the express words, as well as from the subject of it; therefore it ought, by the known rules of law, to receive a liberal construction, and to be extended to all cases within the mischiefs intended to be remedied, even if the words were not comprehensive enough in their strict literal sense to extend to them. But in this case I think the words are sufficient to include the case in question; for, by the purview, 'the bringing any 'writ of error or suit for reversing such fine, recovery, 'or judgment', is restrained to 20 years after such fine levied, or such recovery suffered, or judgment signed; so that the words of the statute extend, not only to writs of error, but to any *suit* generally, without distinction, for reversing such fine, recovery, or judgment: and it is plain that the word *such* relates to the word ancient, and that antiquity is in this

statute applicable to the term of twenty years. In the construction of remedial statutes, the full extent is to be given to every word in the purview, in suppression of the mischief intended to be remedied, notwithstanding the title or the preamble be not equally extensive."

Surrender. 1 Inst. 60 *b.*

25. Lord Coke says, if by custom copyholds may be entailed, the same by like custom, by surrender, may be cut off; and that it had been so adjudged. In a case in 15 Ja. the Court of King's Bench held, that an entail of a copyhold could not be cut off by surrender, unless it were by special custom, and directed the jury to find accordingly. And it was said, that to maintain this custom, it ought to be shown that a *formedon* had been brought upon such a surrender, and judgment given that it did not lie: yet it was agreed that it was a strong proof of a custom, that they to whose use such surrenders had been made, had enjoyed the lands against the issue in tail.

Lee v. Brown, Poph. 128.

Hill v. Upchurch, Co. Sup. § 12.

26. In a case concerning lands held of the manor of Northall in Essex, it was agreed, that where copyhold lands might be entailed, a custom that a surrender should be a bar or discontinuance of such estate, was good.

27. It appears to have been settled in some modern cases, that a surrender by a tenant in tail of a copyhold will bar his issue, without a special custom, unless a special custom be found that a recovery is necessary.

White v. Thornburg, Prec. in Cha. 425. Gilb. R. 107. 2 Vern. 705.

28. A. being a copyholder, covenanted by marriage articles to surrender to trustees, to the use of himself for life, remainder to his wife for life, remainder to the heirs male of his body, remainder to his own right heirs. A. died without having made any surrender,

leaving B. his son, and M. his daughter. B. surrendered the copyhold for payment of his debts.

Lord Harcourt was of opinion, that the copyhold being entailed by the articles, could not afterwards, by a bare surrender, be defeated, without a particular custom had been found to warrant it. But this decree was reversed by Lord Cowper, who said, that *prima facie* it must be taken that a surrender by such tenant in tail will bind his issue, unless a particular custom were found that there ought to have been a recovery.

Roe v. Jeffrey, 2 Man. & Selw. 92.

29. In a subsequent case, three Judges against Lord Ch. J. Willes held, that where copyholds were entailable, and the custom did not prescribe any mode of barring the entail, it might be done by surrender. But the Lord Ch. Justice thought, that in such a case a recovery was the proper mode.

Carr v. Singer, 2 Ves. 603.

30. A surrender to the use of a will not only effectuates the will, but also operates as a bar to an estate tail, of which an account will be given in the next Title.

Tit. 38. c. 4.

A Custom to bar by Surrender or by Recovery, is good.

31. A custom of barring estates tail in copyholds by surrender, may subsist concurrently with a custom to bar such estates by a recovery in the lord's court.

Everall v. Smalley, 1 Wils. 26. 2 Stra. 1197.

32. In ejectment for a copyhold estate, a case was made for the opinion of the Court, wherein it was stated, that within the manor of Collingham, where the lands lay, there were two customs of barring estates tail, which had been used within the said manor time out of mind; one was by common recovery, the other by a surrender in fee to a purchaser. That Edward Smalley, on the marriage of his son Robert, surrendered the premises to his son, and Susannah his wife, and their heirs in general tail. They had issue

Edward Smalley, their son and heir, who after their deaths became tenant in tail, and surrendered the premises, according to the custom of the manor, to John Mills and his heirs in fee, who dying, left Robert Mills his heir, and plaintiff's lessor. The defendant was Henry Smalley, son and heir of Edward Smalley, who surrendered the premises to John Mills as aforesaid. And whether the defendant Edward Smalley, the heir in tail, was barred by the surrender in fee, where there was also a custom within the same manor of barring by recovery, was the question.

After two arguments, it was unanimously resolved by the Court, that the heir in tail was barred.

Lord Ch. J. Lee.—" It has been said at the bar, that a custom in a manor to bar a tail by surrender, ought only to be allowed *ex necessitate, i. e.* when in the same manor there is no usage to bar by a recovery. There is, indeed, great diversity in the books as to barring copyhold entails, but in none of them can I find any case to warrant the distinction. The latter opinion of Judges is, that in manor courts, where a real action can be brought, a recovery in such court will be a good bar. I own I can see no reason why the custom to bar by surrender should not be good. But it is objected to barring entailed copyholds by recovery; for recompence in value does not extend to copyholds; the issue in tail of copyholds not being barred in respect of the recovery in value; but to prevent the inconvenience of perpetuities, these two customs may well stand together, and are but different ways of barring the entail; and I think the surrender the best."

Chapple, Just. to the same effect.—" And the customs must be taken to be both coeval; we cannot

say which is prior; they seem equally convenient, to prevent perpetuities."

Wright, Just.—" It seems to be agreed by the counsel on both sides, that an entail of a copyhold may be barred by a recovery, or by a surrender in fee, within a manor, where there is no custom for barring by recovery; but it is insisted on one side, that these two customs cannot stand together. It has been a controverted question, since I attended this bar, whether copyholds could be entailed; it is now at this day said they may, by custom co-operating with the statute *De donis;* but this is quite new to me. The statute *De donis* created no new estate. Copyholders are no more than tenants at will; and it is by the will of the lord, and his mere consent only, that they are permitted to limit their copyholds in this or that way, either by surrender, or as the custom happens to be. And surely the lord, who of his mere will permits a limitation to I. S. and the heirs of his body, may permit I. S. to alien the same by surrender. Nobody ever thought that copyholds were within the statute *De donis.* Barring entails in copyholds has been much talked of, but I think there is no such thing: it is only a way invented and permitted by the lord, to get rid of the entail; the true reason of the issue in tail being barred is the recovery over in value; now there can be no such thing in a copyhold. I think the surrender is the better way, if the lord permits it, because cheaper."

Denison, Just.—" Nothing more clear than that tenant in tail of a copyhold may bar his issue by surrender; and where there may be a real action, there
1 Inst. 60 *b.* may be a recovery. These are only two different conveyances: and it might as well be said that at

common law, where there is a fine, that will bar the issue as well as the recovery, therefore one of them must be void. A surrender, I think, is a more natural way of conveying copyholds than a recovery, and I cannot see any use a recovery is of, but only to create greater expence."

Doe v. Truby, 2 Black. R. 944. S. P.

33. A grant of the freehold of a copyhold estate, to a person having an estate tail in such copyhold, will operate so as to extinguish and destroy the estate tail.

A Grant of the Freehold will destroy an Estate Tail.

34. A person being tenant in tail male of a copyhold estate, remainder to himself in fee, purchased the freehold of the copyhold from the lord, and then sold the land. The Court was of opinion, that the purchaser of the freehold should attract the other estate, which was but at will. And after taking time to consider of it, decreed accordingly, that the purchaser should enjoy against the issue in tail.

Parker v. Turner, 1 Vern. 393—458. 2 Ca. in Cha. 174.

35. A copyholder in tail accepted a grant from the lord of the manor of the freehold and fee simple of the land, to him and his heirs, and died indebted by bond, wherein his heirs were bound. On a bill brought by the bond creditor for satisfaction out of the assets left by the obligor, the question was, whether the premises were assets by descent, and liable to the bond?

Dunn v. Green, 3 P. Wms. 9.

Lord Macclesfield, after time taken to consider of it, thus delivered his opinion:

"Unless it be expressly found that the custom of the manor allows of entails, then this is a fee conditional, and plainly merged by the grant of the freehold in fee: but supposing the custom of the manor *does* warrant entails, yet the copyhold is extinguished, because in the eye of the law that is but an estate at will, and must be merged by the grant of the free-

hold. The premises by such grant are severed from the manor, consequently the custom of the manor cannot corroborate the legal estate at will. The copyholder cannot hold of himself, and the copyhold, though entailed, is swallowed up in the greater estate of the freehold: and as the tenant, after such time as he took the grant, did not himself continue a copyholder, so his son, on the descent of the freehold, is likewise no copyholder; which may be said from son to son, *ad infinitum*. Moreover, if the entail of the copyhold be not extinguished, it will be a perpetuity; since the only proper way of barring the entail of a copyhold is, by recovery in the lord's court: but after such severance as in the present case, no recovery can be suffered in the lord's court."

36. At the end of the above case there is a note, in which it is said: "If A. be copyholder in tail, remainder to B. in fee, and A. takes a grant of the freehold from the lord, to him and his heirs, and dies without issue, is not B., in whom there was once a vested remainder in fee of the copyhold premises, entitled to the same?" In answer to this Mr. Cox says: "With respect to the *quere* made in the note above, it seems that the remainder-man could have no equity against the tenant in tail, who had power to bar the remainder, one way or other, upon the principles of Cann v. Cann, 1 Vern. 480."

Vide Blake v. Blake, Tit. 3. c. 1. § 13.

37. This doctrine has been confirmed in the following modern case.

Challoner v. Murhall, 2 Ves. Jun. 524.

W. Murhall surrendered a copyhold to the use of himself and his wife for their lives, and the life of the survivor, remainder to the use of William, their eldest son in tail, remainder to John, their second son in tail, remainder to his third and other sons in tail. W. Murhall, the eldest son, died without issue; John

and Thomas were the surviving sons. The Duke of Bridgwater, who was seised in fee of the manor, by lease and release granted the said premises to the said W. Murhall the elder, his heirs and assigns for ever, freed and enfranchised from all services. W. Murhall died without having disposed of the said premises, or the freehold thereof; by which means they descended to John Murhall, who by his will charged the same with the payment of his debts and legacies, and devised them to T. Murhall, his third son. In this manor no recoveries were suffered, but estates tail were barred by surrender.

The bill was filed by legatees; the Master reported that the premises were charged by the will, to which report exceptions were taken.

Lord Loughborough said, it was impossible that any equity could keep alive this entail; Thomas Murhall, the third son and next remainder-man in tail, never could have had a bill against his father, and elder brother. No one could have a right against the tenant in tail. The case from Lord Jeffries proved a plain proposition, that where the interest of the lord of the manor was united with the coyyhold in tail, there must be a merger, for the method of barring it could not exist. Parker v. Turner, ante, § 34.

38. Where the trust of a copyhold is entailed, the same mode of barring it should be adopted, as if it were a legal entail. This proposition may be supported by reasoning analogically from the case of an equitable entail of freehold lands; and by the authority of Lord Hardwicke, who, in discussing the mode of barring a conditional fee in a copyhold, has said, "If the estate had been entailed, it would have been necessary to have barred the entail by some 9 Mod. 484. How an equitable Entail may be barred.

proper means, either by a recovery suffered in the lord's court, if the custom of the manor had admitted it, or by a surrender. And though the entail had not been of the legal, but of the trust estate, all possible endeavours ought to have been used to have barred it in the ordinary way. And the rules of the common law, in regard to the barring of such estate tail, ought to have been pursued as near as possible, according to the case of Otway v. Hudson."

Tit. 38. c. 4. § 28.

39. It has been determined, that where a tenant in tail of the trust of a copyhold accepted a surrender of the legal estate from the trustees, it was a bar to the entail, and remainders over.

Grayme v. Grayme, 1 Watk. Cop. 277. 2d ed.

40. John Grayme surrendered certain copyholds to the use of two trustees and their heirs, to such uses as he should declare by his will; and on the same day made his will, and declared that the trustees should stand seised of the premises to the use of John Grayme, son of Oliver Grayme, for life, with remainder to the heirs male of his body, remainder to Oliver Grayme in the same manner. The trustees were admitted. John Grayme, the son of Oliver, became possessed, as tenant in tail, and died, leaving a son John, who also became possessed as tenant in tail; when the trustees surrendered the premises to the use of the said John in fee, who was admitted, and died leaving three daughters.

The plaintiff claimed as heir male of Oliver, by reason of failure of issue male of John. The defendants were the daughters of John the son, and claimed under the surrender made by the trustees to the use of their father in fee.

Lord Apsley said, the acceptance of the surrender, and the admittance under it, was evidence

of an intent to acquire a fee, and therefore a bar to the entail in equity. And dismissed the bill, but without costs.

How conditional Fees are barred. Tit. 10. c. 1. § 47.

41. It has been stated, that where the custom of a manor does not admit of an entail of a copyhold, a surrender to the use of a person and the heirs of his body, gives him a conditional fee. And in that case it has been held, that a surrender after issue had, will bar the estate.

Stanton v. Barnes, Co. Sup. § 12.

42. A surrender of copyhold lands was made within the manor of Stevenson, to the use of I. S. and the heirs of his body; and after issue had, he surrendered the same to a stranger.

It was agreed by all the Justices, that this was a conditional fee at common law; and, that after issue, I. S. might alien the lands.

Pullen v. Middleton, 9 Mod. 483.

43. An estate was limited to trustees, to the use of A. and the heirs of her body; she married B. The lands were copyhold, and not capable by the custom of being entailed, so that no recovery could be suffered of them. The husband and wife, by indenture of bargain and sale, to lead the uses of a recovery, declared that the lands should be to the use of the husband and his heirs; and afterwards suffered a common recovery in the Court of Common Pleas.

Lord Hardwicke said, that taking this estate to be a fee simple conditional at common law, in trust for the wife, as it really was, after the condition performed, she might have devised it, had she been sole, by will, which would have operated as a good appointment of the trust. Being a feme covert, she had joined with her husband in executing a deed to make a tenant to the *præcipe*, and suffering a common recovery to the use of the husband and his heirs. Now it was certain that a feme covert might, by a common

recovery, convey her fee simple land, as well as bar an estate tail; for she being secretly examined before the recovery was suffered, she was as effectually barred as she would be in the case of a fine. But besides this deed and recovery, the husband and wife had gone farther; they had brought their bill in the Court of Chancery against the trustees to convey the legal estate, and a decree had been made for that purpose, which he was to suppose had been carried into execution; so that all had been done that could be done to transfer the estate to the husband. And he was of opinion that it was well transferred; and he did not see how this differed from the devise of a trust copyhold estate, which had always been held good.

Tit. 38. c. 4.

Effect of Releases. 1 Inst. 59 *a*.

44. Although in general a copyhold estate can only be aliened by surrender and admittance, yet Lord Coke says, where a man hath but a right to a copyhold, he may release it by deed, or by copy, to one that is admitted tenant *de facto*.

Kite and Queinton's Case, 4 Rep. 25.

45. A copyholder surrendered his lands out of court to the use of another and his heirs, upon certain conditions. At the next court the surrender was presented, but in the presentment the conditions were omitted; and the person to whose use the surrender was made being dead, the lord by the steward, according to the custom, admitted his daughter and heir, who entered. The person who made the surrender, by his deed, released to the daughter, being in possession, and afterwards entered upon her: and if his entry was lawful, or not, was the question?

It was adjudged that his entry was not lawful. The great doubt was, if by the said release by deed, the customary right of the copyholder was extinct, and he who made the surrender barred of his right:

and it was objected that Littleton says, a copyholder cannot alien his land by deed, but if he will alien, he ought to surrender; and that such tenants are called tenants by copy, because they have no other evidence concerning their tenements, but the copies of the court-rolls; and it was said that that excludes all releases by deed, for then they would have other evidences than the court-rolls. Also it was said, that he who purchases the land, may, upon searching the rolls, be advised if the title of the land be good. But if a release by deed should extinguish rights, then it would be very dangerous to purchasers, for that does not appear in the rolls. To which it was answered and resolved, that the release in the case at bar extinguished the right of the copyholder; and their reason was, because he to whom the release was made was admitted to the tenements and copyhold in possession; so that a release of the customary right might enure to him, and therefore the lord was not at any prejudice, for he had his fine upon admittance, and he to whom the release was made was in by title, namely, by the lord's admittance; and so the release enured by way of extinguishment. Hull v. Sharbrooke, Cro. Ja. 36. S. P.

46. It was said in the same case, that if a copyholder be ousted by *tort*, there his release by deed to the disseisor, or other wrong-doer, doth not transfer his right, nor bar him, for two reasons: 1st. Because he has no customary estate upon which the release of the customary right can enure; 2d. It would be to the lord's prejudice, for thereby he would lose his fine and services: and for these reasons the release by deed in such case is utterly void. And this is not against any thing Littleton says, for he speaks of an alienation by surrender, and that of necessity ought to be into the lord's hands, according to the custom. But 4 Rep. 25 b. § 74.

the release in the case at bar could not be made to the lord, but to the copyhold tenant in possession.

Co. Cop. § 36.

47. Lord Coke says, if a person is ousted of his copyhold, and the lord admits him who has ousted the copyholder, according to the custom, a release by the person ousted will extinguish his right. But if a copyholder makes a lease for years of his copyhold, he cannot by his release pass the reversion; because such release enures by way of enlargement to transfer an interest, and not by way of extinguishment to drown a right. The proper way would be, to surrender the reversion to the lord, and he to grant it over to the lessee.

Tit. 32. c. 6. § 32.

Wase v. Petty, Win. 3.

48. If two persons have a copyhold estate in joint tenancy, and one of them releases to the other, this is good, without any surrender or admittance of him to whom the release was made; because the first admittance was of them and every of them; and the ability to release arose from the first admittance.

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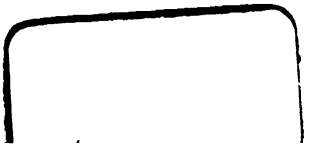
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